Supreme Court, U.S.
FILED

02 931 DEC 13 2002

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

AIRSTAR HELICOPTERS, INC.,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION; JANE F. GARVEY, Administrator of the Federal Aviation Administration; UNITED STATES DEPARTMENT OF TRANSPORTATION; NORMAN Y. MINETA, Secretary of the United States Department of Transportation; NATIONAL PARK SERVICE; ROBERT L. ARNBERGER, Superintendent of the Grand Canyon National Park; FRAN P. MAINELLA, Director of the National Park Service; UNITED STATES DEPARTMENT OF THE INTERIOR; GALE A. NORTON, Secretary of the United States Department of the Interior; and THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

SHARON L. BROWNE
Counsel of Record
ANTHONY T. CASO
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932
Counsel for Petitioner

QUESTIONS PRESENTED

The National Parks Overflights Act, 16 U.S.C. § 1a-1, was adopted for the purpose of protecting the resources of the Grand Canyon National Park from adverse impacts associated with aircraft overflights. In taking action to implement the Act, the Federal Aviation Administration and National Park Service limited the number of flights each air tour operator could fly over the Park. Although the Act was silent as to its applicability to Native Americans, the agencies nonetheless carved out an exemption for flights landing at and taking off from an airport operated by an Indian Tribe. The exemption was created for the sole purpose of providing a commercial advantage for members of the Indian Tribe. In light of the agencies' action in interpreting a congressional statute, the questions presented are as follows:

1. Whether federal agencies' interpretation of a statute that raises serious constitutional questions under the equal protection component of the Due Process Clause of the Fifth Amendment because it creates a racial classification exempting members of an Indian Tribe from its requirement should be subject to strict scrutiny review under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and not the rational basis test under *Morton v. Mancari*, 417 U.S. 535 (1974).

2. Whether federal agencies have the authority to carve out exemptions from environmental regulations to benefit members of Indian Tribes without specific authorization by Congress to do so.

PARTIES TO THE PROCEEDING

Petitioner is AirStar Helicopters, Inc. (AirStar). AirStar was a petitioner before the United States Court of Appeals for the District of Columbia Circuit. United States Air Tour Association, Inc.; Air Vegas Airlines, Inc.; Grand Canyon Airlines, Inc.; Las Vegas Helicopters, Inc.; Maverick Helicopters, Inc.; and Scenic Airlines, Inc., were also petitioners below along with AirStar but take no part in this petition. Papillon Grand Canyon Helicopters, Inc., was also a petitioner below but voluntarily withdrew in July, 2001. AirStar states that it is a privately held corporation and that it has no parent corporations, subsidiaries, or affiliates that issue shares to the public.

The caption of the Petition for Writ of Certiorari contains the names of all the Respondents, joined in their official capacities. They, or their predecessors, were respondents before the United States Court of Appeals for the District of Columbia Circuit.

The following were intervenors in the United States Court of Appeals for the District of Columbia Circuit: Grand Canyon Trust, National Parks and Conservation Association, Sierra Club, Wilderness Society, Friends of the Grand Canyon, Grand Canyon River Guides, Inc., and the Hualapai Indian Tribe of Arizona.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION AT ISSUE 1

STATUTORY PROVISIONS INVOLVED 2

REGULATION INVOLVED 2

STATEMENT OF THE CASE 2

1. National Parks Overflights Act 2
2. FAA's Actions 3
3. Judicial Proceedings 5

REASONS FOR GRANTING THE WRIT 7

I. THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION 7

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *MANCARI* AND *RICE v. CAYETANO* 12

III. THE DISTRICT OF COLUMBIA CIRCUIT'S APPLICATION AND CONSTRUCTION OF *MANCARI*'S "UNIQUE INDIAN INTERESTS" TEST CONFLICTS WITH THE NINTH CIRCUIT'S DECISION IN *WILLIAMS v. BABBITT* 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 6-10, 16

Agostini v. Felton, 521 U.S. 203 (1997) 7, 11

Buckley v. Valeo, 424 U.S. 1 (1976) 9

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 15

City of Richmond v. Croson,
488 U.S. 469 (1989) 9

Fullilove v. Klutznick, 448 U.S. 448 (1980) 9

Grand Canyon Air Tour Coalition v. FAA,
154 F.3d 455 (D.C. Cir. 1998) 3

Louisiana Public Service Commission v. FCC,
476 U.S. 355 (1986) 12

McLaughlin v. Florida, 379 U.S. 184 (1964) 9

Morton v. Mancari, 417 U.S. 535 (1974) ..... passim

Rice v. Cayetano, 528 U.S. 495 (2000) 12-14

United States Air Tour Association v. Federal Aviation Administration,
298 F.3d 997 (D.C. Cir. 2002) 1

United States v. Antelope,
430 U.S. 641 (1977) 16

Williams v. Babbitt, 115 F.3d 657
(9th Cir. 1997) 15-17

TABLE OF AUTHORITIES—Continued

Page

United States Constitution

Amend. V 1

Statutes

25 U.S.C. § 461, *et seq.* 12

§ 500, *et seq.* 15

28 U.S.C. § 1254(1) 1

43 U.S.C. § 46110(a) 5

Miscellaneous

Benjamin, Stuart M., *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996) 7-8

Farnsworth, Wayne R., Note, *Bureau of Indian Affairs Hiring Preferences After* Adarand Constructors, Inc. v. Pena, 1996 B.Y.U.L. Rev. 503 (1996) 8

Gould, L. Scott, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702 (2001) 8

Shockey, Frank, *"Invidious" American Indian Tribal Sovereignty:* Morton v. Mancari *Contra*, Adarand Constructors, Inc. v. Pena, Rice v. Cayetano, *and Other Recent Cases*, 25 Am. Indian L. Rev. 275 (2000/2001) 8

Williams, David C., *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. Rev. 759 (1991) 8

TABLE OF AUTHORITIES—Continued

Page

Williams, David C., *Sometimes Suspect: A Response to Professor Goldberg-Amrose*, 39 UCLA L. Rev. 169 (1991) 8

PETITION FOR WRIT OF CERTIORARI

Petitioner AirStar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 298 F.3d 997 (D.C. Cir. 2002), and appears at Petitioner's Appendix (Pet. App.) A.

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia Circuit was entered on August 16, 2002. Pet. App. at A-1. This petition is timely filed pursuant to Supreme Court Rule 13. On November 6, 2002, Chief Justice Rehnquist granted Petitioner's timely application to extend the time within which to file the petition to and including December 14, 2002. Application No. 02A368. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

This case concerns the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution, which reads in pertinent part: "No person shall . . . be deprived of . . . life, liberty, or property, without due process of law."

STATUTORY PROVISIONS INVOLVED

The statutes involved in this case include the National Overflights Act, 16 U.S.C. § 1a-1, note Sec. 3, Pub. L. 100-91 (Aug. 18, 1987), Pet. App. B; the Regulatory Flexibility Act, 5 U.S.C. § 601-12, Pub. L. 96-354, 94 Stat. 1164 (Sept. 19, 1980), Pet. App. C; Judicial Review of Agency Actions, 5 U.S.C. §§ 701-706, Pet. App. D; and Judicial Review of Federal Aviation Administration Orders, 49 U.S.C. § 46110, Pet. App. E.

REGULATION INVOLVED

This case involves the Commercial Air Tour Limitation in the Grand Canyon National Park Special Flight Rules Area, Final Rule, 14 C.F.R. Part 93, 65 Fed. Reg. 17,708-17,733 (Apr. 4, 2000), Pet. App. F; corrected 65 Fed. Reg. 33,751 (May 25, 2000), Pet. App. G.

STATEMENT OF THE CASE

1. National Parks Overflights Act

Congress enacted the National Parks Overflights Act (Overflights Act) in 1987, to protect the Grand Canyon National Park from "noise associated with aircraft overflights." Pet. App. at B-7. According to Congress, overflights were "causing a significant adverse effect on the natural quiet and experience of the park." *Id.* To correct this problem, Congress directed the National Park Service (NPS) to develop recommendations "to achieve the substantial restoration of natural quiet" in the Park. *Id.* Congress also directed the Federal Aviation Administration (FAA) to "prepare and issue a final plan for the management of air traffic in the air space above the Grand Canyon." Pet. App. at B-8. The Overflights

Act is silent on providing authority to the agencies to carve out exemptions from its reach for Native Americans.

2. FAA's Actions

On December 31, 1996, the FAA issued a final rule that eliminated commercial air tours over much of the Grand Canyon by establishing flight free zones (areas into which aircraft may not fly), instituting flight curfews, and setting a cap on the number of aircraft each commercial air tour provider could fly over the park—but not on the number of flights. Pet. App. at A-5, F-5 to F-6. Its goal was to substantially restore natural quiet to the Grand Canyon as required by the Overflights Act. Pet. App. at F-10. The validity of that rule was upheld in *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455 (D.C. Cir. 1998). Pet. App. at A-3, A-6, F-6. The FAA did not carve out any exemptions.

On April 4, 2000, the FAA, in conjunction with the NPS (the Agencies) issued a final rule by publishing the Commercial Air Tour Limitation in the Grand Canyon National Park Special Flight Rules Area (the Limitation Rule), the subject matter of this action. Pet. App. F. The Limitation Rule modified the aircraft cap that was adopted in 1996.[1] Pet. App. at A-6, F-21. It severely limits the number of commercial air tours that AirStar and other air tour providers could fly over the Grand Canyon. Pet. App. at A-8, F-1. Under the Limitation Rule, a commercial air tour provider "may not conduct more flights in the Park than it conducted during the base year of May, 1997, through April 30, 1998." *Id.* Although the goal of the

---

[1] On April 4, 2000, the FAA also published Modification of the Dimensions of the Grand Canyon National Park Special Flight Rules Area and Flight Free Zones, FAA-99-5926 (the Airspace Rule), which modifies air flight paths in the Grand Canyon National Park. On October 17, 2001, the District of Columbia Circuit severed the Airspace Rule from the Limitation Rule. Pet. App. at A-8. The Airspace Rule is not part of this action.

Limitation Rule was "to prevent an increase in aircraft noise by limiting the number of commercial tours," it exempted from its reach all flights landing at and taking off from the Grand Canyon West airport located on the Hualapai reservation for the sole purpose of protecting the economic benefits of certain members of the Tribe.[2] Pet. App. at F-28, F-31 to F-32. According to the FAA, the purpose of the exemption was "to ensure continued employment of Hualapai community members." Pet. App. at F-29, *see also* F-75. It also ensured members of the Tribe would have access to tourists and commercial air tour operations. *Id.*

The Agencies found that the Limitation Rule would have significant economic impact on both the commercial air tour operators and the Hualapai Tribal members. Pet. App. at F-15, F-31 to F-32. Nonetheless, the Agencies limited severely the annual number of flights each commercial operator could fly over the Park.[3] Pet. App. at F-43. In contrast, the Agencies treated the members of the Hualapai Tribe differently. Because the Limitation Rule would "have the immediate negative effect upon the number of Hualapai who derive their livelihood from tourism at GCW [Grand Canyon West]," the Agencies agreed to exempt all air tours that take off or land at the reservation.

---

[2] The Grand Canyon West airport is located on Hualapai reservation land, which adjoins the southwestern part of the Grand Canyon National Park. Pet. App. at F-28, F-74.

[3] From May 1, 1997, through April 30, 1998, there were 24 commercial air tour operators conducting air tours over the Grand Canyon National Park in airplanes and helicopters, including AirStar. The Limitation Rule would eliminate the 3.3% expected growth of air tours resulting in a loss of $155.4 million in net operating revenue between 2000 and 2009 to air tour operators. Pet. App. at F-64, F-72, F-75 to F-76, F-96. The Agencies also concluded that the annual losses for some commercial air tour providers, including AirStar, would be as high as $6.3 million. Pet. App. at F-84.

Pet. App. at F-44 to F-45. The purpose and effect of this exemption was to grant members of the Hualapai Tribe a distinct competitive advantage of uninterrupted access to tourists and the air tour operators.[4] Pet. App. at F-28, F-30. The Agencies reasoned that "as federal agencies they owe a general trust responsibility to Native American Tribes or Nations, including the Hualapai Tribe." Pet. App. at F-31. The Agencies acknowledged that the Overflights Act was silent on providing an exemption based on an Indian classification, but nonetheless claimed the authority to create one. "Pursuant to this unique trust responsibility, the FAA and NPS are essentially acting in the interest of the Tribe, however, they do so in the context of other federal statutes and implementing regulations." Pet. App. at F-31. The Limitation Rule did not cite to any federal statute authorizing them to make this exemption.

3. Judicial Proceedings

On May 9, 2000, AirStar filed a Petition for Review, pursuant to 43 U.S.C. § 46110(a). The petition challenged the Limitation Rule on a variety of grounds including the Agencies' exemption of all "flights to and from the Hualapai Indian Reservation from each tour operator's annual allocation." Pet. App. at A-24. AirStar argued that not only did the Agencies lack the authority to make this exemption, but the exemption violated the equal protection component of the Due Process Clause of the Fifth Amendment to the United States

---

[4] The Agencies found that members of the Hualapai "had a substantial economic interest in air tour business brought to its reservation via air tour operators." Pet. App. at F-31. Because the Limitation Rule eliminates the expected 3.3% growth of air tours, the Tribe would forego the potential revenue generated from an additional 25,700 air tours carrying [133,900] passengers over the 2000-2009 time period. The Agencies recognized that many members of the Tribe benefit from tourism, which is their primary means of employment. Pet. App. at F-76.

Constitution. According to AirStar, the exemption was made solely on the basis of race and/or nationality for the purpose of providing members of the Hualapai a commercial advantage.

AirStar asked the reviewing court to find that the Agencies had no authority to carve out a race-based exemption for the Hualapai unless Congress conferred such a power on them. According to AirStar, because the Agencies were unable to cite to a federal statute authorizing them to exempt Native Americans, the Agencies' actions were not in accordance with law. AirStar also asked the reviewing court to analyze the Agencies' actions under strict scrutiny because the exemption creates a suspect classification on the basis of race, ethnicity, ancestry, or nationality. AirStar's argument was founded on this Court's holding in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), which directed reviewing courts to apply strict scrutiny to all "suspect" classifications and to uphold the legislation only if its classification is precisely tailored to further a compelling governmental interest.

On May 9, 2002, the court of appeals rejected AirStar's arguments. Instead of finding that the Agencies had no authority to carve out a race-based exemption or applying strict scrutiny, the court below gave great deference to the Agencies' interpretation that they were authorized to create race-based exemptions for Native Americans. The court of appeals also recognized that this Court in *Morton v. Mancari*, 417 U.S. 535, 555 (1974), had upheld an employment preference for Indians in the face of an argument similar to that of AirStar declaring that, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such treatment must be upheld." Pet. App. at A-24. The court of appeals found that "there is no dispute that the Hualapai exception is at least rationally related to 'the government's interest in fulfilling its trust obligation' to the Tribe." *Id.* (citation omitted).

In response to AirStar's contention that the legal landscape had changed requiring reviewing courts to apply strict scrutiny to all race classifications, the court of appeals stated: "[L]ower courts do not have the power to make that determination," *id.* (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)), and anyway, "this circuit has continued to apply *Mancari* post-*Adarand*." *Id.* at A-25.

AirStar timely files this petition for certiorari.

REASONS FOR GRANTING THE WRIT

On these important questions of whether federal agencies can carve out race-based exemptions from federal environmental regulations without the express authorization of Congress and whether all race-based classifications are required to be reviewed under strict scrutiny, the court below issued a decision that conflicts with the decisions both of this Court and other courts of appeals. Those conflicts require resolution by this Court.

I

THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION

The issue of *Mancari's* continued vitality following this Court's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, is a constitutional question of extraordinary importance. It will determine to what extent federal agencies can discriminate in favor of Native Americans. This debate is occurring not only in the courts but among commentators, both before and after *Adarand*.[5] This case now comes before this

[5] A sampling of the various commentators include: Stuart M. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996) (recognizing that (continued...)

Court because a cloud of constitutional uncertainty has cast its shadow over the proper application of this Court's pronouncement that "all federal racial classifications. . .must be analyzed by a reviewing court under strict scrutiny," *Adarand*, 515 U.S. at 227, and whether strict scrutiny applies to Indian classifications. As described above, although the Overflights Act was silent as to its applicability to Native Americans, the lower court ruled that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," such preferences will not violate the equal protection component of the Fifth Amendment. Pet. App. at A-24 (citing *Morton v. Mancari*, 417 U.S. 535).

---

[5] (...continued)
Adarand creates an uneasy relationship between Congress' special relationship with Indian tribes recognized in *Morton v. Mancari*, and the hostility to racial classifications in *Adarand*; and ultimately, between historical tradition of treating native groups differently and the idea that racial classifications are repugnant and therefore are presumed to violate equal protection norms); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 718 (2001) (*Mancari*'s overlay of race with status may have hurt as much as it helped. It is a refuge for race-conscious legislation in an *Adarand* world of race neutrality. It permits preferences and delegations of authority that otherwise would not escape strict scrutiny . . . . Moreover, the Court has yet to rise to the scholarly bait offered to replace it.); Frank Shockey, *"Invidious" American Indian Tribal Sovereignty:* Morton v. Mancari *Contra*, Adarand Constructors, Inc. v. Pena, Rice v. Cayetano, *and Other Recent Cases*, 25 Am. Indian L. Rev. 275 (2000/2001); Wayne R. Farnsworth, Note, *Bureau of Indian Affairs Hiring Preferences After* Adarand Constructors, Inc. v. Pena, 1996 B.Y.U.L. Rev. 503 (1996); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. Rev. 759 (1991); David C. Williams, *Sometimes Suspect: A Response to Professor Goldberg-Amrose*, 39 UCLA L. Rev. 169 (1991).

Moreover, this case presents an ideal vehicle for addressing the important constitutional question it presents. The court of appeals' ruling upholding the Agencies' authority to carve out an exemption for Native Americans for the sole purpose of creating a commercial advantage for members of the Tribe cannot be reconciled with this Court's most recent pronouncement on the authority of Congress to distinguish between and among Americans on the basis of race. In *Adarand*, this Court held: "[F]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Adarand*, 515 U.S. at 235. Thereupon, reflecting on its ruling of a decade earlier in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court declared: "[O]f course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard [than strict scrutiny], it is no longer controlling." *Adarand*, 515 U.S. at 235. Because this Court's ruling in *Mancari*, 417 U.S. 535, held that a federal racial classification was subject to a less rigorous standard, *Mancari*, like *Fullilove*, should be deemed "no longer controlling."

In *Adarand*, this Court enunciated three propositions regarding governmental racial classifications: First, skepticism. "[R]acial classifications [are] 'constitutionally suspect.'" 515 U.S. at 223 (citing *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). Second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." 515 U.S. at 224 (citing *City of Richmond v. Croson*, 488 U.S. 469, 494 (1989) (plurality opinion)). And third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). Moreover, concluded this Court in *Adarand*, these three propositions "all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution

protect *persons*, not *groups*." 515 U.S. at 227. Accordingly, this Court held:

> [A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Adarand, 515 U.S. at 227.

In *Mancari*, deciding whether an employment preference for American Indians with the Bureau of Indian Affairs (BIA) violated the equal protection component of the Due Process Clause, this Court engaged in none of the analysis required by *Adarand*. Instead, enunciating the test to be applied, this Court declared simply:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.

Mancari, 417 U.S. at 555. Thereupon, as to the employment criterion under review, this Court held: "[W]here the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violated due process." *Id.*

Although it does not appear to have been the basis upon which the Court's ruling in *Mancari* turned, this Court did hold that the "preference, as applied, is granted to Indians not as a discrete racial group, but rather as members of quasi-sovereign tribal entities," that is, "the preference is political rather than racial in nature." *Mancari*, 417 U.S. at 554 & n.24. Whether such a careful distinction survives *Adarand* is uncertain, especially in a setting such as this one where the BIA, tribal sovereignty, or self-governance are not directly implicated.

Instead, the race-based exemption was created by administrative regulation for the sole purpose of providing an economic benefit to certain members of the Hualapai.

Because the Agencies carved out an exception to the reach of the Overflights Act solely to benefit members of an Indian Tribe, the court of appeals should have applied strict scrutiny to determine the validity of the Limitation Rule. Instead, relying on the rational basis test announced in *Mancari*, the lower court held that the application of strict scrutiny was not required; that so long as a rational basis existed for carving out an exemption to benefit members of an Indian Tribe, the Agencies' actions creating the race-based preference would not be disturbed. Pet. App. at A-24.

Petitioner acknowledges, of course, that no lower court, including the District of Columbia Circuit, should conclude that this Court's "most recent cases have, by implication, overruled an earlier precedent." *Agostini*, 521 U.S. at 237. In the final analysis, it is precisely this exclusive authority to overrule this Court's decision in *Mancari* or to clarify its reach that brings AirStar to this Court today. Reviewing courts are struggling on what standard of review to apply. Only this Court can answer that question.

For these reasons, this Court should grant the writ to resolve the conflict on whether reviewing courts are required to apply the strict scrutiny test or the rational basis test to actions by federal agencies that carve out exemptions for Native Americans for the sole purpose of creating a commercial advantage to benefit certain members of the Tribe.

II

THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *MANCARI* AND *RICE v. CAYETANO*

In rejecting AirStar's equal protection argument, the court of appeals concluded that "the Hualapai exception is at least rationally related to 'the government's interest in fulfilling its trust obligation' to the Tribe." Pet. App. at A-24. However, the Agencies were unable to cite to any federal statute authorizing them to exempt Native Americans from the reach of the Overflights Act. Nonetheless, the court below assumed that the Agencies had a "general trust obligation." Thus, the court of appeals extended *Mancari* to mean that federal agencies may ameliorate the economic impact of environmental regulations by carving out an Indian Tribe exemption from their application without specific authorization from Congress. Not only does this decision run afoul of the statutory rule that "an agency has no power to act . . . unless Congress confers power upon it," *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986), but it runs afoul of this Court's decisions in both *Mancari* and *Rice v. Cayetano*, 528 U.S. 495 (2000).

Mancari was the first time in which this Court was confronted with an equal protection challenge to a law benefitting Native Americans. In *Mancari*, nonIndian employees of the BIA argued that a BIA employment preference for Indians, authorized by a statute allowing Indian preferences,[6] violated the equal protection component of the Due Process Clause of the Fifth Amendment. This Court's discussion of the equal protection challenge was fairly brief but noted the "unique legal status of Indian tribes under federal law" and the "plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes." *Mancari*, 417

---

[6] The BIA was acting pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461, *et seq.*

U.S. at 551. This Court found the special preference was justified because "as members of quasi-sovereign tribal entities," the "lives and activities [of Indians] are governed by the BIA in a unique fashion." *Id.* at 554. This Court concluded: "[T]he legal status of the BIA is truly *sui generis*." *Id.* Moreover, this Court limited its holding to "particular and special" legislation "designed to further Indian self-government." *Id.* at 555.

As long as this Court could characterize the special benefits to Indian Tribes as being extended on a government-to-government basis through acts of Congress, it could distinguish a special preference from suspect classifications that are subject to strict scrutiny. Here, the court of appeals' decision ignored the requirement in *Mancari* that the legislation be tied rationally to Congress's trust responsibility to Indian Tribes. In the present case, there is no evidence that Congress intended the Agencies to treat Native Americans differently under the Overflights Act. In enacting the Overflights Act, Congress was not legislating on behalf of federally recognized Indian Tribes. Congress's purpose in enacting the Overflights Act was to protect the Grand Canyon from "noise associated with aircraft overflights." Pet. App. at B-7. Yet, the court of appeals simply extended *Mancari* to uphold the Agencies' actions of exempting an Indian Tribe in order to provide uninterrupted access to tourists and commercial air tour operators to members of the Tribe.

Further, the court of appeals' decision conflicts with *Rice v. Cayetano*, 528 U.S. at 520. In *Rice*, this Court declined an invitation to extend *Mancari* to a new and larger dimension. Justice Kennedy explained that *Mancari* turned on quasi-sovereign authority relating to self-governance, which caused this Court to uphold "a federal provision giving employment preferences to persons of tribal ancestry." *Id.* at 518 (citing *Mancari*, 417 U.S. at 553-55). But, distinguishing the facts of *Mancari* from those before it, the Court declared that the

legislative preference in *Mancari* was " 'designed to further Indian self-government.' " *Id.* at 520 (quoting *Mancari*, 417 U.S. at 555). Moreover, the Court in *Mancari* "was careful to note, however, that the case was confined to the authority of the BIA, an agency described as '*sui generis*.' " *Id.* (quoting *Mancari*, 417 U.S. at 554).

In contrast, in order for the court below to apply the *Mancari* rational basis test, it was necessary for it to assume that the FAA had the same "*sui generis*" relationship with Indian Tribes as the BIA. However, the FAA's uniqueness relates to its authority to regulate flying and the safe use of the Nation's airspace, not Indians. The Agencies' actions are beyond the scope of this mandate. In effect, the FAA, through the Limitation Rule, delegated to the Indian Tribe the authority to decide how many overflights there will be at the Grand Canyon. In other words, commercial air tour providers can launch an unlimited number of overflights as long as they pay the Indian Tribe for the use of its runways. There is no doubt this arrangement is profitable for the Indians and may be rationally related to bettering the conditions of the Indian Tribe, but it cannot possibly be reconciled with Congress's instruction to the FAA to reduce noise of air traffic over the Grand Canyon.

By its decision below, the District of Columbia Circuit "extend[ed] the limited exception of *Mancari* to a new and larger dimension," *Cayetano*, 528 U.S. at 520, by according the Agencies the same treatment as this Court accorded the BIA, (notwithstanding this Court's caution that "the BIA is truly *sui generis*," *Mancari*, 417 U.S. at 554) and by applying the language of *Mancari* to all matters tribal (notwithstanding this Court's admonition that *Mancari* was limited solely to matters relating to "quasi-sovereign authority [and] self-governance," *Cayetano*, 528 U.S. at 518, 520).

III

THE DISTRICT OF COLUMBIA CIRCUIT'S APPLICATION AND CONSTRUCTION OF *MANCARI*'S "UNIQUE INDIAN INTERESTS" TEST CONFLICTS WITH THE NINTH CIRCUIT'S DECISION IN *WILLIAMS v. BABBITT*

There is a conflict between the District of Columbia Circuit and the Ninth Circuit on the construction and application of the *Mancari* "unique Indian interests" test when the racial classification is aimed at assisting Indians economically. In the decision below, the District of Columbia Circuit said that the exemption carved out by the Agencies for members of the Hualapai Tribe meets the rational basis test of *Mancari* simply because the federal Agencies said that it did. This was so, according to the court below, even though there is nothing in the Overflights Act to indicate that Congress intended to provide a competitive advantage to Indians. The court of appeals did not independently examine whether the exemption was rationally tied through the purposes of the Overflights Act to "unique Indian interests" but simply deferred to the federal Agencies.

Unlike the District of Columbia Circuit, the Ninth Circuit in *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), recognized that because the interpretation of the Reindeer Act of 1937, 50 Stat. 900 (Sept. 1, 1937), 25 U.S.C. § 500, *et seq.*, by the Interior Board of Indian Appeals (IBIA) created a racial classification that "pushes the constitutional envelope," the reviewing court was required to conduct its own examination.[7]

---

[7] The Ninth Circuit declined to defer to the agency's interpretation under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), explaining that when a federal agency's interpretation raises grave and serious constitutional doubts, reviewing courts are required "to scrutinize constitutional objections

(continued...)

The Ninth Circuit also accepted that there was doubt as to the appropriate standard of constitutional review. It recognized that in *Adarand*, Justice Stevens dissented on several grounds, but objected that the majority's concept of consistency would subject preferences for Native Americans to the same scrutiny as invidious discrimination against minorities. *Williams*, 115 F.3d at 665 (citing *Adarand*, 515 U.S. 244-45 (Stevens, J., dissenting)). The Ninth Circuit speculated that "[i]f Justice Stevens is right about the logical implications of *Adarand*, *Mancari's* days are numbered." *Id.* at 665.

With these constitutional doubts unresolved, the Ninth Circuit assumed that the *Mancari* doctrine retained some vitality as long as the legislation provides "special treatment [that] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Williams*, 115 F.3d at 663. According to the Ninth Circuit, to be "tied rationally" means the legislation must relate to "native land, tribal or communal status, or culture." *Id.* at 664.

As explained by the Ninth Circuit:

> Legislation that relates to Indian land, tribal status, self-government or culture passes *Mancari's* rational relation test because "such regulation is rooted in the unique status of Indians as a 'separate people' with their own political institutions."

Id. (quoting *United States v. Antelope*, 430 U.S. 641 (1977)).

Applying this construction of *Mancari*, the Ninth Circuit found that IBIA's interpretation of the Reindeer Act, as barring all in Alaska who are not Natives from owning imported reindeer, was wrong. The court reasoned that it provided "a naked preference for Indians unrelated to unique Indian

---

[7] (...continued)
to a particular agency skeptically." *Williams v. Babbitt*, 115 F.3d at 662.

interests," because it involved a commercial industry "that is not uniquely native." The court found that the special preference "in no way related to native land, tribal or communal status or culture." *Williams*, 115 F.3d at 663.

Based upon this construction of *Mancari*, the Ninth Circuit concluded that the Secretary's construction of the Act, albeit "not unreasonable" and otherwise entitled to deference under *Chevron*, raised "constitutional problems [that] are truly 'grave,'" which called judicial "constitutional narrowing" into play. *Id.* The court thereupon adopted what it deemed to be a "less constitutionally troubling construction" of the Act, namely, "as not precluding non-natives in Alaska from owning and importing reindeer." *Id.* at 666.

In sharp contrast to the Ninth Circuit, the decision below carved out a Native American commercial advantage, protecting members of an Indian Tribe's access to air tourists and air tour operators which is now guaranteed by the government. This new commercial advantage is "unrelated to unique Indian interests." It is a "naked preference for Indians" that provides an economic advantage to members of a Tribe solely on account of their status as Native Americans. Given the grave constitutional concerns raised by such a troubling regulatory regime, this Court should review the District of Columbia Circuit's understanding and application of the constitutional principles involved.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: December, 2002.

Respectfully submitted,

SHARON L. BROWNE
Counsel of Record
ANTHONY T. CASO
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

TABLE OF CONTENTS

A. Decision from the United States Court of Appeals for the District of Columbia Circuit (August 16, 2002)

B. National Parks Overflights Act (16 U.S.C. § 1a-1)

C. Regulatory Flexibility Act (5 U.S.C. §§ 601-612)

D. Judicial Review of Agency Actions (5 U.S.C. §§ 701-706)

E. Judicial Review of Federal Aviation Administration Orders (49 U.S.C. § 46110)

F. Federal Aviation Administration Final Rule (65 F.R. 17,708) April 4, 2000

G. Correction to Federal Aviation Administration Final Rule (65 F.R. 33,751) May 25, 2000

Appendix A-1

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 9, 2002 Decided August 16, 2002

No. 00-1201

UNITED STATES AIR TOUR ASSOCIATION, ET AL.,
PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.,
RESPONDENTS

GRAND CANYON TRUST, ET AL.,
INTERVENORS

Consolidated with
00-1212

On Petitions for Review of an Order of the
Federal Aviation Administration

William Davis Thode and *Joseph F. Becker* argued the cause for petitioners United States Air Tour Association, et al. With them on the briefs was *William Perry Pendley*. *Lorraine B. Halloway* and *Timothy M. Biddle* entered appearances.

Bills of costs must be filed within 14 says after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Alexander E. Dreier argued the cause for petitioners Grand Canyon Trust, et al. With him on the briefs were *Michael L. Kidney*, *Catherine S. Stetson*, *Jeffrey C. Nelson*, and *Robert Wiygul*.

Ronald M. Spritzer, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the brief was Ellen J. Durkee, Attorney.

Michael L. Kidney, *Catherine E. Stetson*, *Alexander E. Dreier*, *Jeffrey C. Nelson*, and *Robert Wiygul* were on the brief of intervenors Grand Canyon Trust, et al.

Glenn M. Feldman argued the cause and filed the brief for intervenor Hualapai Indian Tribe.

Before: EDWARDS, HENDERSON, and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: As part of an ongoing effort to reduce aircraft noise in Grand Canyon National Park, the Federal Aviation Administration (FAA) promulgated a rule limiting the number of air tours permitted to fly over the Park. Two groups of petitioners, one led by the United States Air Tour Association and the other by the Grand Canyon Trust, challenge that rule. We reject the challenges brought by the Air Tour Association, but conclude that the challenges brought by the Trust raise issues that require further consideration by the FAA.

Appendix A-3

I

The history of regulation of aircraft overflights at Grand Canyon National Park is set out in *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 460-64 (D.C. Cir. 1998) [hereinafter *Grand Canyon I*]. We recount some of that story here and explain subsequent developments to the extent necessary to give context to the present controversy.

A

In 1987, Congress enacted the National Parks Overflights Act, Pub. L. No. 100-91, 101 Stat. 674 (set out at 16 U.S.C.A. § 1a-1 note). Section 3 of the Act declared that "[n]oise associated with aircraft overflights at the Grand Canyon National Park is causing a significant adverse effect on the natural quiet and experience of the park." Overflights Act § 3(a). To address this problem, Congress required the Secretary of the Interior to submit to the Administrator of the FAA:

> recommendations regarding actions necessary for the protection of resources in the Grand Canyon from adverse impacts associated with aircraft overflights. *The recommendations shall provide for substantial restoration of the natural quiet and experience of the park* and protection of public health and safety from adverse effects associated with aircraft overflights.

Id. § 3(b)(1) (emphasis added). Congress also required the FAA to "prepare and issue a final plan for the management of air traffic in the air space above the Grand Canyon." *Id.* § 3(b)(2). That plan, the Act declared, "shall . . . implement the recommendations of the Secretary without change unless the [FAA] determines that implementing the recommendations would adversely affect aviation safety." *Id.* Finally, Congress

directed the Secretary to submit, within two years of the effective date of the plan, "a report discussing (A) whether the plan has succeeded in substantially restoring the natural quiet in the park; and (B) such other matters, including possible revisions in the plan, as may be of interest." *Id.* § 3(b)(3).

In response to the Overflights Act, the Secretary of the Interior submitted recommendations to the FAA in December 1987. In May 1988, the FAA implemented those recommendations in the form of Special Federal Aviation Regulation (SFAR) 50-2. *See* Special Flight Rules in the Vicinity of the Grand Canyon National Park, 53 Fed. Reg. 20,264 (June 2, 1988). The regulation applied to aircraft flying below 14,500 feet and established, inter alia, flight free zones (areas into which aircraft may not fly), minimum altitudes, and other rules constraining flight paths within the Park. It remained in effect through 1997.

On September 12, 1994, the National Park Service (the Park Service or NPS), on behalf of the Secretary of the Interior, submitted the report to Congress required by section 3 of the Overflights Act. *See* NPS, U.S. Dep't of the Interior, Report on the Effects of Aircraft Overflights on the National Park System (published in 1995) [hereinafter 1994 NPS Report]. In that report, the Park Service made several foundational determinations. First, it decided that the appropriate measure for quantifying aircraft noise was the percentage of time that aircraft are audible. *See id.* at 60. Second, the Park Service concluded that the key statutory phrase, "substantial restoration of the natural quiet," required that "50% or more of the park achieve 'natural quiet' (i.e., no aircraft audible) for 75-100 percent of the day." *Id.* at 182. Subsequently, the agencies determined that an aircraft was audible at three decibels above the average natural ambient sound level. *See* FAA, U.S. Dep't of Transp., Environmental Assessment: Special Flight Rules in

the Vicinity of Grand Canyon National Park 4-4 to 4-5 (1996) [hereinafter 1996 Environmental Assessment].

Applying these principles, the agencies concluded that, under SFAR 50-2, only 31% of the Park enjoyed "a substantial restoration of natural quiet"—by which they meant that only 31% of the Park experienced natural quiet for at least 75% of the day. Special Flight Rules in the Vicinity of Grand Canyon National Park, 61 Fed. Reg. 69,302, 69,317 (Dec. 31, 1996) [hereinafter 1996 Final Rule].[1] Moreover, the agencies predicted that without revisions to the existing regulations, projected growth in the number of air tours would cause the percentage of the Park enjoying substantial restoration of natural quiet to drop to less than 10% by the year 2010. *Id.*

On December 31, 1996, the FAA issued a final rule that adopted the definitions contained in the 1994 NPS Report, including the definition of substantial restoration of the natural quiet. *See* 1996 Final Rule, 61 Fed. Reg. at 69,305-10. Among other things, the 1996 Final Rule also established new flight free zones, instituted flight curfews, and set a cap on the number of aircraft that could fly over the park—although not on the number of flights. *See id.* at 69,317, 69,332. In addition to the 1996 Final Rule, the FAA proposed two further rules: one to modify flight paths in the Park; the other to require operators to use quieter aircraft. *See* Proposed Air Tour Routes for the

---

[1] When the agencies discuss their current progress toward "a substantial restoration of natural quiet," they refer to the percentage of the Park experiencing natural quiet for at least 75% of the day. When they discuss the overall statutory goal of "substantial restoration of the natural quiet," however, they refer to a situation in which at least 50% of the Park achieves natural quiet for at least 75% of the day. Depending upon the context, we will use the phrase in the same two ways in this opinion.

Grand Canyon National Park, 61 Fed. Reg. 69,356 (Dec. 31, 1996); Noise Limitations for Aircraft Operations in the Vicinity of Grand Canyon National Park, 61 Fed. Reg. 69,334 (proposed Dec. 31, 1996). The FAA predicted that the 1996 Final Rule, in conjunction with the two proposed rules, would meet the statutory goal of substantial restoration of the natural quiet by the year 2008. *See* Noise Limitations for Aircraft Operations, 61 Fed. Reg. at 69,329.

In October 1997, the FAA discovered that it had significantly underestimated the number of tour aircraft operating in the Park, and that as a consequence the 1996 Final Rule would be less effective than it had thought. *See* Special Flight Rules in the Vicinity of Grand Canyon National Park, 62 Fed. Reg. 58,898, 58,899 (Oct. 31, 1997). After oral argument in *Grand Canyon I*, the FAA informed the court that it was considering placing a cap on the number of flights, in addition to the 1996 Final Rule's cap on the number of aircraft. *See Grand Canyon I*, 154 F.3d at 464.

B

In *Grand Canyon I*, several groups of petitioners challenged provisions of the 1996 Final Rule. The principal challenges came, as they do here, from a group of air tour operators (the Air Tour Coalition) that included members of petitioner Air Tour Association, and from a group of environmental organizations led by petitioner Grand Canyon Trust. The air tour operators argued that the rule did "too much, too soon," while the Trust argued that it did "too little, too late." *Grand Canyon I*, 154 F.3d at 459-60. We upheld the rule against both challenges.

In the course of our decision, we affirmed—against challenges from both the Coalition and the Trust—the Park

Service's definition of "substantial restoration of the natural quiet" as "50% or more of the park achiev[ing] 'natural quiet' (i.e., no aircraft audible) for 75-100 percent of the day." That definition, we said, was a reasonable construction of an ambiguous statutory phrase. *Id.* at 466-67 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 841-43 (1984)). We also upheld as reasonable the agencies' three-decibels-above-ambient measure of audibility, and we rejected the Air Tour Coalition's contention that the agencies had ignored their statutory obligation to consider the actual experience of Park visitors. *Id.* at 465-67, 469. We did not need to decide whether there was such a statutory obligation, because it was clear that the agencies' definition and audibility measure were specifically developed to address and to enhance the experience of Park visitors. *Id.* *Grand Canyon I* also observed that the Overflights Act "clearly divides the institutional responsibilities between" the FAA and the Park Service. *Id.* at 468. Because the Act directs the FAA to "implement the recommendations of the Secretary without change" unless they would adversely affect aviation safety, we held that the FAA "had no choice but to adopt the Park Service's recommendations" regarding substantial restoration of the natural quiet. *Id.*

Finally, we noted the Trust's complaint that, using the Park Service's definition and the FAA's recent reevaluation of its data, neither the 1996 Final Rule nor the two additional proposed rules would achieve Congress' goal of substantially restoring natural quiet in the Park. We agreed that it would be arbitrary and capricious for the government not to intend to achieve the congressional goal on any timetable at all. *Id.* at 477. We accepted, however, the FAA's assurance that it still "anticipates meeting the goal of substantial restoration by 2008" through implementation of the two proposed rules and consideration of a cap on the total number of overflights. *Id.* at 478. In so doing, we emphasized that the Trust could raise its

claim again if "the FAA does not issue additional regulations reasonably promptly, or if those regulations do not appear likely to achieve the statutory goal on a reasonable timetable." *Id.*

C

On April 4, 2000, the FAA published two additional rules governing flights over the Grand Canyon. One of those rules (the Airspace Rule), not at issue here, modifies air flight paths in the Park.[2] The second rule, the Limitations Rule, is the subject of the petitions for review filed in this case. That rule imposes a cap on the total number of commercial air tours that operators may run in the Park. *See* Commercial Air Tour Limitation in the Grand Canyon National Park Special Flight Rules Area, 65 Fed. Reg. 17,708 (April 4, 2000) (codified at 14 C.F.R. §§ 93.303-.325) [hereinafter Limitations Rule]. Under the Limitations Rule, an air tour operator may not conduct more flights in the Park than it conducted during the base year of May 1, 1997 through April 30, 1998. 14 C.F.R. § 93.319(a), (b).

In developing the Limitations Rule, the FAA and the Park Service issued three associated documents that detailed the methodology they used to quantify noise levels in the Park and to measure progress toward the goal of substantial restoration of the natural quiet. First, the Park Service announced in July 1999 that it was changing the threshold at which it would regard aircraft noise as audible in part of the Park. *See* Change

---

[2] *See* Modification of the Dimensions of the Grand Canyon National Park Special Flight Rules Area and Flight Free Zones, 65 Fed. Reg. 17,736 (April 4, 2000). On October 17, 2001, this court severed challenges to the Airspace Rule from those to the Limitations Rule at issue here, and held the former challenges in abeyance pending ongoing FAA administrative proceedings.

in Noise Evaluation Methodology for Air Tour Operations Over Grand Canyon National Park, 64 Fed. Reg. 38,006 (July 14, 1999) [hereinafter Change in Noise Evaluation Methodology]. As discussed above, the agencies had previously adopted a threshold of three decibels above the average natural ambient sound level, a measure of audibility we affirmed in *Grand Canyon I*. In the Change in Noise Evaluation Methodology, the Park Service divided the Park into two zones: Zone One, encompassing about one-third of the Park, includes the more developed areas; Zone Two, encompassing two-thirds, contains the backcountry. The Park Service announced that in Zone One it will continue to consider aircraft audible at three decibels above the average natural ambient level. 64 Fed. Reg. at 38,006-08. For Zone Two, however, the Park Service determined that aircraft noise is audible if it is eight decibels below the average natural ambient level. *Id.*

Second, in January 2000, the Park Service issued a review of its Change in Noise Evaluation Methodology. NPS, Dep't of the Interior, Review of Scientific Basis for Change in Noise Impact Assessment Method Used at Grand Canyon National Park (2000) [hereinafter 2000 NPS Review]. The review explained in detail the acoustic model used in assessing noise impacts in the Park. It also reaffirmed the Park Service's 1994 definition of "substantial restoration of the natural quiet" as: "Fifty percent or more of the Park achieving 'natural quiet' (i.e., no aircraft audible) for 75-100 percent of the day." *Id.* at 16. And it stated that "[t]his definition is a threshold not to be exceeded on any given day . . . and refers to . . . the 12 hour daylight period . . . during which air tours occur." *Id.*; *accord id.* at 4-5.

Third, in February 2000, the FAA issued a Final Supplemental Environmental Assessment in which it analyzed the effects that it expected the Limitations Rule to have on noise in the Park. *See* FAA, U.S. Dep't of Transp., Final

Supplemental Environmental Assessment: Special Flight Rules in the Vicinity of Grand Canyon National Park (2000) [hereinafter FSEA]. Of particular importance here, the FSEA stated that the FAA intended to use an "average annual day" standard when determining the percentage of "the day" that is restored to natural quiet at a given location. *See id.* at 4-12, 4-18, F-4. The assessment also made clear that the FAA's noise model only accounts for noise from tour aircraft, and does not consider noise from other aircraft that fly over the Grand Canyon, including commercial jets, general aviation, and military flights. *Id.* app. G, at 40.

Applying these standards, the FAA concluded that the Limitations Rule would make "significant steps towards substantially restoring natural quiet," Limitations Rule, 65 Fed. Reg. at 17,713, although the combined effect of all of the agency's rulemakings would still not achieve the goal of having 50% of the Park experience natural quiet for at least 75% of the day, *id.* at 17,711. The FAA estimated that only 32% of the Park currently achieved that mark, and that if no further action were taken, future air tour growth would reduce that to 25% of the Park in nine to ten years. *Id.* at 17,724. Adding the new 2000 rules, the FAA predicted, would increase the percentage of the Park experiencing the substantial restoration of natural quiet to above 41% and maintain that level in the future. *Id.*; *see* FSEA at 4-18 (predicting substantial restoration of 43.6% of the Park through 2003 and 43.5% in 2008). But the agency recognized that additional steps, including implementation of the still-pending quiet technology rule, would be necessary to achieve Congress' goal in the Overflights Act. Limitations Rule, 65 Fed. Reg. at 17,714.

D

As noted above, two groups of petitioners have filed challenges to the Limitations Rule. The first is led by the

United States Air Tour Association, a trade organization whose members fly air tours over the Park. The second, led by the Grand Canyon Trust, is a group of six environmental organizations. Petitioners level a number of challenges at the rule, raising questions of statutory construction, regulatory interpretation, and the rationality of the agencies' methodologies and policy choices.

As to questions of statutory construction, where legislation is "silent or ambiguous with respect to [a] specific issue," we are obligated to defer to an agency's interpretation as long as it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Similarly, we defer to an agency's reading of its own regulation, unless that reading is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted). We also examine agency regulations to determine whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C. § 706(2)(A). In that regard, the question for the court is whether the agency has considered the relevant factors and articulated a "'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Finally, by statute the FAA's findings of fact "are conclusive" if they are "supported by substantial evidence." 49 U.S.C. § 46110(c).

We apply these principles to our analysis of the Air Tour Association's challenges to the Limitations Rule in Part II below, and to those of the Grand Canyon Trust in Part III.

II

The Air Tour Association asks this court to hold the Limitations Rule unlawful for five principal reasons: (i) it was prompted by an improper change in the definition of "natural quiet"; (ii) the acoustic methodology that justifies the rule is scientifically flawed; (iii) the FAA arbitrarily and capriciously issued the rule without first promulgating a quiet technology rule; (iv) in promulgating the rule, the FAA violated the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*; and (v) the rule arbitrarily and capriciously ignores the needs of the elderly and disabled. These five contentions are considered in the following sections.

A

In determining the need for the Limitations Rule, as well as its predicted impact on noise in the Park, the FAA employed the standards announced in the Park Service's 1999 Change in Noise Evaluation Methodology. Although the new methodology continues to use the three-decibels-above-ambient threshold for measuring audibility in the more-developed areas of the Park, it substitutes an eight-decibels-below-ambient threshold for use in backcountry areas. The Air Tour Association contends that this reflects a new interpretation of the statutory term "natural quiet." It argues that while the previous interpretation was based on "noticeability," measuring sounds that a person not engaged in active contemplation of the Park likely would notice, the new interpretation substitutes a "detectability" standard, measuring any sound that is detectable to a vigilant observer.

The Air Tour Association further asserts that this change is unlawful because it is inconsistent with our opinion in *Grand Canyon I*, which upheld the three-decibels-above-ambient threshold. The new threshold for Zone Two is contrary to

Grand Canyon I, the tour operators argue, because it is unrelated to how visitors actually experience aircraft noise in the Park. According to the Air Tour Association, visitors to the Grand Canyon do not attentively listen for such sounds, and would not notice below-ambient-level noise. Because the new standard is inconsistent with *Grand Canyon I*, and because it represents a change from the prior standard, the Air Tour Association urges us to accord it less deference than we would ordinarily extend to an agency determination.

We must begin with the last point, because it misperceives the scope of our review. The Supreme Court "has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question." *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) (quoting *Chevron*, 467 U.S. at 862). An agency is not required to establish "rules of conduct to last forever," but rather "must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances." *State Farm*, 463 U.S. at 42 (internal quotation marks omitted). Nor does the fact that we previously affirmed an agency interpretation fix that interpretation in stone. In *Grand Canyon I* we held that the standards employed in the 1996 Final Rule reflected a reasonable construction of the Overflights Act. 154 F.3d at 469. That does not preclude a new standard, promulgated pursuant to notice and comment as this one was, from being reasonable as well. What the Park Service must do to sustain its decision is justify the change in course with a "reasoned analysis." *State Farm*, 463 U.S. at 57 (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)); *see Rust*, 500 U.S. at 186-87.

The Park Service has provided that reasoned analysis. First, it contends that it has not changed the underlying definition of natural quiet. *See* Change in Noise Evaluation Methodology, 64 Fed. Reg. at 38,006. The original 1994 NPS

definition, applied in the 1996 rule, was "no aircraft audible," 1994 NPS Report at 182; 1996 Environmental Assessment at 4-2, which is the same definition we upheld as reasonable in *Grand Canyon I*, *see* 154 F.3d at 461-62. According to the agency, it continued to employ that definition during the Limitations Rule rulemaking. *See* Change in Noise Evaluation Methodology, 64 Fed. Reg. at 38,007 ("[A]udibility is the basis for assessing progress toward the legislatively mandated goal of substantially restoring natural quiet."); *id.* at 38,011 ("Natural quiet remains the same as 'no aircraft audible.'").

What has changed, the Park Service says, is the threshold it uses to measure audibility in Zone Two. The agency agrees with the tour operators that the 1996 rule used a noticeability threshold for determining when sounds become audible, based on "the level at which visitors engaged in activities other than contemplation of the national park are likely to hear aircraft noise." Change in Noise Evaluation Methodology for Air Tour Operations Over Grand Canyon National Park, 64 Fed. Reg. 3969, 3971 (proposed Jan. 26, 1999) [hereinafter Proposed Change in Noise Evaluation Methodology]; *see also* Change in Noise Evaluation Methodology, 64 Fed. Reg. at 38,007. That, it says, is what led to the original three-decibels-above-ambient standard. But the Park Service contends that since 1996 it has gathered more data and performed additional research. *Id.* That data, collected in Grand Canyon National Park, shows that "an active listener could hear aircraft when their sound levels were between 8 and 11 [decibels] below the A-weighted ambient." FSEA at 4-5; *see* Change in Noise Evaluation Methodology, 64 Fed. Reg. at 38,007; Proposed Change in Noise Evaluation Methodology, 64 Fed. Reg. at 3971-72.[3]

---

[3] The A-weighted level of a sound is a single number determined by combining the sound levels in all frequencies. This combining de-emphasizes the low and high frequencies

(continued...)

The new studies resulted in the Park Service's decision to divide the Park into two zones, and to use different noise thresholds for each zone. The agency continued to apply the three-decibels-above-ambient threshold in the more-developed areas of the Park, where visitors were often engaged in activities other than contemplation. But it employed the new, eight-decibels-below-ambient standard in the remaining, mostly backcountry areas. In those areas, the Park Service was concerned about the experience of visitors "sitting quietly but actively seeking to experience the natural quiet and solitude of the park." Proposed Change in Noise Evaluation Methodology, 64 Fed. Reg. at 3971. The Park Service's evidence is that such visitors are able to perceive aircraft noise at the lower decibel level. *Id.* As the agency explains, "the threshold for Zone Two is set at 8 decibels below the average ambient sound levels" because it is "a threshold which reflects the point at which aviation noise can be heard (i.e., audible) by ground visitors seeking to experience the natural and cultural soundscapes of national parks." *Id.* at 3972. Thus, far from representing a lack of concern for visitors' experiences, the agency adopted the distinction between the two zones precisely because visitors experience sound differently in different areas.

Nor does the use of a threshold below the ambient indicate, as the Air Tour Association contends, that aircraft noise is banned even though it cannot be heard above the natural ambient sound. Rather, it reflects the Park Service's new

---

[3] (...continued)
in a manner similar to the sensitivities of human hearing. The A-weighted level is widely accepted as one of the best over-all sound level metrics for analysis of transportation noise. It has been shown to correlate well with human assessment of the loudness or noisiness of a sound.

Change in Noise Evaluation Methodology, 64 Fed. Reg. at 38,001.

understanding that audibility depends not just on volume (loudness), but also on frequency (pitch). Change in Noise Evaluation Methodology, 64 Fed. Reg. at 38,011. As the agencies explain, "studies conducted in the [Park] for the NPS . . . have shown that individuals who are *actively* listening can hear aircraft at lower levels than the ambient A-weighted sound levels . . . because aircraft sound often contains tones that are not present in the natural ambient sound." FSEA at 4-5 (emphasis in original); *see* Change in Noise Evaluation Methodology, 64 Fed. Reg. at 38,012.[4] Hence, in order to preserve the definition of natural quiet as "no aircraft audible" in the backcountry, the Park Service concluded that it was necessary to change the threshold of audibility to below the ambient level.

We conclude that the Park Service's explanation for its change in methodology—as well as its explanation of why that change remains true to the agency's original principles—are reasonable, and that the change is neither arbitrary nor capricious.

B

We next consider the Air Tour Association's "scientific"

---

[4] The Park Service offers this example:

> [D]uring a concert if we listen for a high note on the piccolo, only the portion of the background sound ... that is of nearly the same pitch can interfere with our ability to hear the piccolo. The base violins can play as loudly as they like without the piccolo becoming inaudible. . . . Hence, the relative overall "loudness" of the background and the target sounds is not the key factor in the detection process. For a target sound to be audible, it must . . . be louder than . . . background sounds in the same frequency band.

Change in Noise Evaluation Methodology, 64 Fed. Reg. at 38,011.

challenges to the "noise model and related sound data" used by the FAA and the Park Service in crafting the Limitations Rule. Air Tour Ass'n Br. at 15. Again, our standard of review is important. As a general matter, we "defer to the agency's reasonable exercise of its judgment and technical expertise" in the area of "aircraft noise." *Grand Canyon I*, 154 F.3d at 460; *see also Sierra Club v. Dep't of Transp.*, 753 F.2d 120, 129 (D.C. Cir. 1985). When an agency uses a computer model, it must "explain the assumptions and methodology used in preparing the model and, if the methodology is challenged, must provide a complete analytic defense." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983) (internal quotation marks omitted). Ultimately, however, the "scientific nature" of a model "does not easily lend itself to judicial review," and our review "proceeds with considerable deference to the agency's expertise." *Appalachian Power Co. v. EPA*, 135 F.3d 791, 802, 814 (D.C. Cir. 1998). The principal question for us is whether the agencies' explanation of the model's assumptions and methodology is reasonable. *See generally Small Refiner*, 705 F.2d at 535.5.[5]

The agencies used a noise model developed by the FAA, known as the Integrated Noise Model (INM), to assess noise impacts in the Park. The INM is "the most widely used civilian software program for analyzing noise effects relating to changes in airspace use." 2000 NPS Review at 9. The Air Tour

---

[5] Any agency model that satisfied this standard would also satisfy the directive in the National Parks Air Tour Management Act of 2000, passed the day after the publication of the Limitations Rule, that the agencies employ "reasonable scientific methods" when assessing aircraft sound levels within the national parks. Pub. L. No. 106-181, tit. VIII, § 808, 114 Stat. 185, 194 (set out at 49 U.S.C.A. § 40128 note).

Association does not challenge the use of the model itself, but rather the way in which it was applied to the noise problem in the Grand Canyon.

First, the Air Tour Association cites excerpts from the report of a Park Service consultant, to the effect that "a more complex metric is required to achieve satisfactory accuracy." Air Tour Ass'n Br. at 17 (quoting 2000 NPS Review app. F, at 23). But as the government points out, the "more complex metric" recommended by the consultant was the one ultimately used by the agencies, *see* 2000 NPS Review app. F, at 23, and the consultant's overall conclusion was that "the science being used by NPS for noise modeling is grounded on extensive and valid scientific data," *id.* at Executive Summary 4; *see id.* at 1, 8. The Air Tour Association also contends that the INM overestimates aircraft noise because the agencies disabled an algorithm that adjusts for "lateral attenuation"—sound absorption by the ground and the air near the ground. But the FAA reasonably responds that the algorithm was removed because it is used to account for the effect of "flat, acoustically soft terrain, such as grass, as would be found in the vicinity of most major airports." FSEA at 4-7. As the FAA explains, for visitors near the rim of the Canyon "there is effectively no ground surface between the source and receiver," and in the "vast majority of other locations . . . the ground surface is made up of acoustically hard rock and packed dirt." *Id.*[6]

---

[6] The Air Tour Association further criticizes the Park Service for excluding from its analysis data recorded at a number of collection sites. The Service's experts explain, however, that this data was collected before the plan for measuring sound levels was finalized, and that the excluded sites were not representative of the predominant acoustic environments in the Park. 2000 NPS Review app. C, at 8.

Finally, the Air Tour Association cites its own expert, John R. Alberti, for the proposition that the audibility threshold used by the Park Service in Zone Two, eight decibels below the ambient sound level, is scientifically unsupportable because aircraft noise at that level cannot be heard by a listener with normal hearing. Air Tour Ass'n Br. at 18 (citing Comments of JR Engineering to NPS at 3 (Mar. 20, 1999)). The 2000 NPS Review contains a detailed critique, based on analysis by the agency's own experts, of the Alberti study. 2000 NPS Review app. B, at 5-11. The most serious problem with that study, the Park Service explains, is that it used data "that cannot be characterized ... as representative of the park or its many levels of ambient sound." *Id.* at 5. In essence, Alberti began with a significantly lower ambient level than that actually measured in the Park's acoustic environments, making his calculation of eight decibels below that level considerably quieter than the actual audibility thresholds the agencies will employ in Zone Two. *Id.* at 5, 8. Moreover, whatever the theoretical argument, the Park Service reports as a fact that "technicians monitoring the sound environment" in the Park "identified aircraft noise at A-weighted levels of 8-12 decibels below the average A-weighted natural ambient sound levels." Proposed Change in Noise Evaluation Methodology, 64 Fed. Reg. at 3972.

We conclude that the agencies and their experts have presented a satisfactory analytic defense of their model, and therefore reject this challenge from the Air Tour Association. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts.").

C

The Air Tour Association also contends that the FAA acted arbitrarily and capriciously by issuing the Limitations Rule without first promulgating a quiet technology rule. As described by the Association, such a rule would establish standards for identifying "quiet aircraft technology" and would implement "incentive" flight paths for aircraft employing such technology. Air Tour Ass'n Br. at 20-21. According to the Association, Congress first ordered the FAA to establish quiet technology standards in the 1987 Overflights Act, and then did so again in the National Parks Air Tour Management Act of 2000, Pub. L. No. 106-181, tit. VIII, 114 Stat. 185 (set out at 49 U.S.C.A. § 40128 note). Nonetheless, the FAA's 1996 proposed rule on quiet technology is still not final.

The FAA notes that there is some irony in the air tour operators' new-found interest in a quiet technology rule, as they have previously opposed such a rule. Limitations Rule, 65 Fed. Reg. at 17,714. We also note that the operators have misread both the Overflights Act and the Air Tour Management Act. The Overflights Act does not contain a provision regarding quiet technology. The Air Tour Management Act does direct the FAA, by April 5, 2001, to "designate reasonably achievable requirements" for aircraft to be "considered as employing quiet aircraft technology" for purposes of relief from caps on flight operations. § 804(a), (c). However, the Act also provides that "if the Administrator [of the FAA] . . . will not be able to make such designation" by that time, the FAA shall report to Congress "the reasons for not meeting such time period." § 804(a). The FAA submitted the required report. *See* FAA, U.S. Dep't of Transp., Quiet Aircraft Technology for Grand Canyon (2001).[7]

---

[7] Another statute, the Airport and Airway Safety, Capacity, Noise (continued...)

Moreover, the FAA has offered a reasonable explanation for why it has not yet issued a quiet technology rule. According to the agency, there continue to be unresolved technical issues regarding available technology and its noise effects within the Grand Canyon, including the most basic issue: "how to define quiet technology/noise efficiency." Limitations Rule, 65 Fed. Reg. at 17,714. The FAA's brief represents that the agency plans to issue a supplemental notice of proposed rulemaking to invite further comment on the proposed rule. Resp't's Br. at 32. In light of the technical difficulties the FAA is currently having in finalizing a quiet technology rule, its decision to go ahead with a cap on flights to ensure continuing progress toward restoring natural quiet is reasonable. As we explained in *Grand Canyon I*, "ordinarily, agencies have wide latitude to attack a regulatory problem in phases." 154 F.3d at 471.

D

The Regulatory Flexibility Act requires an agency promulgating a final rule to prepare a regulatory flexibility analysis that, inter alia, describes:

> the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable

---

[7] (...continued)
Improvement, and Intermodal Transportation Act of 1992, also mentioned "quiet aircraft technology." Pub. L. No. 102-581, § 134, 106 Stat. 4872, 4888 (set out at 16 U.S.C.A. § 1-1a note). Like the others, it did not direct the FAA to implement a quiet technology rule; it merely instructed the agency to submit a plan of action to Congress "to manage increased air traffic over Grand Canyon National Park . . . to meet the requirements established by [the Overflights Act], including any measures to encourage or require the use of quiet aircraft technology by air tour operators." *Id.*

> statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

5 U.S.C. § 604(a). Although the FAA did prepare a regulatory flexibility analysis for the Limitations Rule, *see* 65 Fed. Reg. at 17,729-31, the Air Tour Association attacks that analysis as defective in two principal respects: (1) it underestimates the burden the Limitations Rule imposes on tour operators by using data regarding the number of tours from May 1997 to April 1998, a period they contend was nonrepresentative; and (2) it fails to consider significant alternatives that would minimize the Rule's economic impact on small entities.

Neither attack is justified. As the FAA explains, it selected the 1997-98 base year because it was "the most accurate and current data available during the period that this rule was being drafted." Limitations Rule, 65 Fed. Reg. 17,718. Indeed, selection of that year actually favors the air tour operators, since subsequent data shows that in the following year the number of air tours declined. *Id.* Moreover, the agency plainly did consider alternatives to the rule, expressly listing nine and explaining its reasons for rejecting them. *Id.* at 17,729-30. The Air Tour Association does not point to any alternative that it believes was unreasonably rejected other than the quiet technology rule, which, as we have discussed above, the FAA has reasonably put off for the present. Because the FAA's analysis was reasonable, the Limitations Rule survives the Tour Association's challenge under the Regulatory Flexibility Act. *See Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 79-80 (D.C. Cir. 2000); *Grand Canyon I*, 154 F.3d at 470-71.

E

Finally, the Air Tour Association contends that the Limitations Rule is arbitrary and capricious because it ignores the needs of the elderly and disabled, who find it harder to visit the Park on the ground. The Association asserts that "nearly half of all Grand Canyon visitors never 'visit the Park on the ground,'" and that "[a]s many as half of these 'air only' visitors are elderly, disabled or mobility impaired and have no meaningful way to experience Grand Canyon except by recreational air tour." Air Tour Ass'n Br. at 22-23 (quoting Limitations Rule, 65 Fed. Reg. at 17,716). By "reducing the annual number of recreational air tours" that can be taken by the elderly and disabled, the Association contends that the Limitations Rule fails to accommodate their needs. *Id.*

Nearly every contention recounted in the preceding paragraph contains a factual error. It is not true, for example, that nearly half of Grand Canyon visitors never visit on the ground. Rather, the authority cited by the Association actually states that over half of *air tour visitors also* visit the Park on the ground. Limitations Rule, 65 Fed. Reg. at 17,716. Indeed, in another part of its brief, the Air Tour Association states that of the more than 5 million people who visit the Grand Canyon annually, only 750,000 visit by air tour. Air Tour Ass'n Br. at 9. And the Association further concedes that there is no record support for its claim that as many as half of the "air only" visitors are elderly, disabled, or mobility impaired. As the Association notes, "the Administrative Record lacks any reference to the demographics of 'air only' Grand Canyon visitors." *Id.* at 23 n.5.

Finally, there is also no truth to the contention that the agencies have failed to consider the needs of the elderly and disabled. As the government explains, air tours are not the only means by which these groups may view the Canyon, as the Park

has available such accommodations as handicapped-accessible trails, mule rides, and raft trips. *See* Resp't's Br. at 34. Nor does the Limitations Rule eliminate or even "reduc[e] the annual number of recreational air tours"; it merely caps the number of flights at current levels. Limiting the number of visitors at a given time in a national park is a standard measure used to protect park resources, *see* Limitations Rule, 65 Fed. Reg. at 17,716, and its application to the resource of "natural quiet" is not unreasonable. It is therefore not surprising that the Air Tour Association failed to return to this argument in its reply brief.[8]

---

[8] The Air Tour Association also argues that the Limitations Rule violates the equal protection component of the Fifth Amendment because it exempts flights to and from the Hualapai Indian Reservation from each tour operator's annual allocation. *See* 14 C.F.R. § 93.319(f). The Association's argument is founded upon *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), in which the Supreme Court held that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." In *Morton v. Mancari*, 417 U.S. 535 (1974), however, the Court upheld an employment preference for Indians in the face of an argument similar to that of the Air Tour Association, declaring that, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians," such treatment must be upheld. *Id.* at 555. And there is no dispute that the Hualapai exception is at least rationally related to "the government's interest in fulfilling its trust obligation" to the Tribe. *Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1340 (D.C. Cir. 1988). Although the Air Tour Association contends that *Adarand* effectively overruled *Mancari*, the Supreme Court has made clear that the lower courts do not have the power to make that determination. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

(continued...)

III

The Grand Canyon Trust raises two challenges of its own to the decisions of the FAA. First, the Trust contends that the agency unlawfully altered the Park Service's definition of substantial restoration of the natural quiet: from 50% of the Park experiencing natural quiet for 75% of "any given day," to 50% of the Park experiencing natural quiet for 75% of "the average annual day." Trust Br. at 12. Second, the Trust argues that the FAA's noise methodology is flawed because it only accounts for noise from commercial air tours, while ignoring noise from other types of aircraft. As a consequence of both errors, the Trust contends that the FAA has greatly overestimated the progress that the Limitations Rule makes toward restoring natural quiet.

We consider these two challenges in sections B and C below. Before doing so, we address the government's objections to our considering the Trust's arguments at all.

A

The Trust filed its petition for review pursuant to 49 U.S.C. § 46110(a), which authorizes review in this circuit of certain final "order[s] issued by the . . . Administrator of the Federal Aviation Administration."[9] The FAA does not dispute that the Limitations Rule is a final order reviewable under that section.

---

[8] (...continued)
(internal quotation marks omitted)). And this circuit has continued to apply *Mancari* post-*Adarand*. *See Narragansett Tribe*, 158 F.3d at 1340.

[9] *See also Puget Sound Traffic Ass'n v. Civil Aeronautics Bd.*, 536 F.2d 437, 438-39 (D.C. Cir. 1976) (holding that review under the predecessor to § 46110(a) extended only to final orders).

See Limitations Rule, 65 Fed. Reg. at 17,708 ("This final rule constitutes final agency action under 49 U.S.C. 46110."). The agency contends, however, that the Trust's challenges are not attacks on the FAA's order, that the decisions the Trust does attack are not final, and that the Trust's challenges are not ripe for judicial review.

The FAA's first argument is that the Trust's challenges are not to the Limitations Rule, but rather to its definition of "the substantial restoration of the natural quiet" and to its methodology for measuring aircraft noise. These, the agency contends, are neither reviewable orders themselves nor parts of the Limitations Rule. But whether the definition and methodology are independently "orders" is a question we need not decide, as there is no doubt that they are both part of the rulemaking record and integral to the agency's rationale for promulgating the Limitations Rule. The fact that they are contained in a separate document, the Final Supplemental Environmental Assessment, is of no moment; we similarly reviewed the Park Service's original definition of "substantial restoration of the natural quiet" in *Grand Canyon I*, even though that definition was contained in the 1994 NPS Report rather than in the 1996 Final Rule. The FSEA was issued concurrently with the Limitations Rule, and the rule's Federal Register notice repeatedly relies on it and incorporates it by reference. *See, e.g.*, Limitations Rule, 65 Fed. Reg. at 17,714 (noting that the noise methodologies "used in support of this rule are explained further" in the FSEA); *id.* at 17,709-10 (noting that the FAA placed the draft Supplemental Environmental Assessment in the rulemaking docket for public comment, and that those comments are "addressed in the [FSEA] issued concurrently with this final rule"). Just as we may examine other record material that provides the underpinnings for the Limitations Rule, so also may we review

analytic documents issued by the agency that elaborate upon the rule's rationale and assess its impact.[10]

The FAA's second argument is that the definition and methodology are not final because "the course the FAA may follow in future rulemakings" is "uncertain," and the Park Service "could revise" its recommendations. But as we have only recently reiterated, "if the possibility . . . of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule . . . would ever be final as a matter of law." *General Electric Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002) (citing *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000)). Both decisions at issue here represent fully-crystallized determinations that the FAA used in promulgating the Limitations Rule, and that it has given every indication it will employ in future rulemakings. Because they represent the "consummation of the agency's decisionmaking process" and are determinations from which "legal consequences will flow," they are final for purposes of judicial review. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

Third, the FAA contends that the Trust's challenges are not ripe for review. To determine whether a challenge to final

---

[10] Two circuit cases cited by the FAA to refute this proposition are inapposite. In *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999), we concluded that we were without jurisdiction to review an EPA Technical Background Document. Unlike the FSEA, that document was not issued as part of or in support of a rulemaking, and was "intended solely to provide information to the public and the regulated community." *Id.* at 545-46. In *Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1418-19 (D.C. Cir. 1998), we held that a statement in the preamble of a *proposed* rule was unreviewable, noting that—unlike the FAA in this case—the EPA had yet to take final action on the proposed rule to which the statement was relevant.

agency action is ripe, we consider "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *General Electric*, 290 F.3d at 380 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). "In determining the fitness of an issue for judicial review we look to see whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Id.* We have already determined that the FAA's definition and methodology are sufficiently final. The challenges to those decisions are fit for review in other respects as well.

Whether the FAA may use an average annual day as part of its definition of substantial restoration, and whether it may ignore the noise of non-tour aircraft, are purely legal issues. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1039 (D.C. Cir. 2002) (finding an issue fit for review because whether an agency determination is arbitrary and capricious or contrary to law is a "purely legal" question). And they arise in the concrete setting of the Limitations Rule. Moreover, we see no reason to believe that our consideration of these issues would benefit from postponing review. As we have already noted, there is nothing "tentative or interlocutory" about the FAA's definition and methodology, *Appalachian Power*, 208 F.3d at 1022, and there is no prospect that they will change in the near future unless questioned by this court. At oral argument, the government suggested that the Trust should wait until the FAA claims natural quiet has been restored to 50% of the Park, and then appeal if it disagrees. But the Trust's argument is that "under FAA's interpretation of the [Overflights] Act it will *never* achieve that mandate." Trust Br. at 23-24 (citing our statement in *Grand Canyon I*, 154 F.3d at 477, that it would be arbitrary and capricious for the FAA to have no intention of achieving the Act's goal). If we assume as we must for purposes of this ripeness analysis that the

Trust's challenges are valid,[11] then its argument is well-founded. For the FAA to substantially restore natural quiet to 50% of the Park on "any given day" (as the Trust contends is required), the agency would have to restore quiet to significantly more than 50% of the Park on the "average annual day." *See infra* Part III.B. And the FAA has never indicated that it has any plans to achieve such a result.

Finally, again assuming the validity of the Trust's arguments, it will suffer hardship if we withhold consideration now.[12] The Trust's members visit the Park and wish to experience its natural serenity. As the FAA stated in the Federal Register notice for the Limitations Rule, it promulgated that rule on the assumption that it would make "significant steps towards substantially restoring natural quiet." 65 Fed. Reg. at 17,713. Indeed, the FAA predicted that the Limitations Rule, together with the 2000 Airspace Rule and other existing regulations, would substantially restore natural quiet to more than 41% of the Park. Id. at 17,724. But the Trust contends that the flaws in the agency's definition and methodology cause it to significantly overestimate its progress toward the statutory goal (correctly understood)—so much so that the true percentage of the Park that will be substantially restored to natural quiet is below 19%.[13]

---

[11] *See, e.g., Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 94 (D.C. Cir. 1986).

[12] *See City of Houston v. HUD*, 24 F.3d 1421, 1431 n.9 (D.C. Cir. 1994) ("[W]here there are no institutional interests favoring postponement of review, a petitioner need not satisfy the hardship prong.").

[13] As we discuss in Part III.B below, the Trust points to evidence in the record that, using an "any given day" rather than an "average annual day" standard, only 19% of the Park will be substantially

(continued...)

Crediting the government with a good-faith intent to achieve the goal of the Overflights Act, the Trust contends that if the FAA knew it was making as little progress toward achieving that goal as in fact it is, it would have "to impose more stringent regulation on air tours to make the progress it sought to make in the [Limitations] Rule." Trust Reply Br. at 3. The FAA might, for example, reduce rather than merely cap the number of authorized air tour flights. We cannot say that the prospects of the Trust achieving such benefits are speculative merely because they depend upon the government's good faith. *Cf. FEC v. Akins*, 524 U.S. 11, 25 (1998) (holding that the plaintiff had standing even though the agency might have reached the same decision had it agreed with the plaintiff's view of the law); *id.* ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case—even though the agency . . . might later, in the exercise of its lawful discretion, reach the same result for a different reason."). We are therefore satisfied that the Trust's contentions are ripe for review and proceed to address them.

B

As we have discussed, section 3(b)(1) of the Overflights Act gives the Secretary of the Interior the responsibility to develop a definition of "substantial restoration of the natural quiet," a responsibility that the National Park Service has performed on behalf of the Secretary. *See Grand Canyon I*, 154

---

[13] (...continued)
restored to natural quiet. Moreover, as we discuss in Part III.C, even that figure is based on a model that ignores noise from non-tour aircraft, and record evidence indicates that including that noise may well further reduce the percentage of the Park to which natural quiet will be substantially restored.

F.3d at 468. In its 1994 report, the Park Service defined the term as requiring that 50% of the Park experience natural quiet at least 75% of "the day." *See* 1994 NPS Report at 182. In its 2000 Final Supplemental Environmental Assessment, the FAA stated that it interpreted the phrase "the day" in the Park Service's definition to mean the "average annual day." FSEA at 4-18 to 4-19; *see id.* at 4-12.

The Trust contends that the FAA's interpretation is unlawful because it substitutes a new FAA definition, "the average annual day," for what the Trust believes to be the Park Service's meaning, "any given day." The Trust further contends that the FAA's interpretation results in a definition of the statutory term, "substantial restoration of the natural quiet," that is arbitrary and unreasonable. The FAA replies that because the phrase "the day" is ambiguous, this court should defer to its interpretation.

In *Grand Canyon I* we held that the statutory term was ambiguous, and we therefore deferred to the Park Service's definition. 154 F.3d at 466-67 (citing *Chevron*, 467 U.S. at 841-43). There is no question that the phrase, "the day," in the Park Service's definition is also ambiguous, and that the Park Service is entitled to deference for its interpretation of its own definition. *See Auer*, 519 U.S. at 461. The problem for the FAA, however, is that it is not the Park Service, and "deference is inappropriate when [an agency] interprets regulations promulgated by a different agency." *Office of Pers. Mgm't v. FLRA*, 864 F.2d 165, 171 (D.C. Cir. 1988); *see Dep't of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988). Nor is the FAA entitled to deference for its own interpretation of "substantial restoration of the natural quiet," as Congress expressly reserved for the Secretary of the Interior the authority to interpret that statutory term. Overflights Act § 3(b)(2); *see Grand Canyon I*, 154 F.3d at 468; *see also Dep't of the Treasury*, 837 F.2d at 1167 ("Under the law of this circuit,

when an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference.").

As far as we can determine, the National Park Service has addressed the meaning of "the day" in its definition of substantial restoration on only one occasion: the January 2000 review of its Change in Noise Evaluation Methodology, issued just three months before the FAA issued the Limitations Rule. [14] In that review, the Park Service stated that it had defined the statutory term, "substantial restoration of the natural quiet," as:

> Fifty percent or more of the Park achieving 'natural quiet' (i.e., no aircraft audible) for 75-100 percent of the day. This definition is a threshold not to be exceeded on *any given day* . . . and refers to the 12 hour daylight period. . . . The NPS believes that it is a reasonable and rational definition.

2000 NPS Review at 16 (emphasis added); *accord id.* at 4-5. This statement clearly supports the Trust's contention that "the

---

[14] The FAA points us to the "inside cover page" of the FSEA as demonstrating Park Service approval of the FAA's average annual day interpretation. Resp't's Br. at 49 n.8. The FSEA, however, is a lengthy FAA document, the inside cover of which says nothing more than that the Department of the Interior is a "cooperating agency." The FAA also argues that the Park Service adopted an "average annual day" standard in the Change in Noise Evaluation Methodology, in which the Service declared that "the time period of interest is the day (i.e., the average 12 daylight hours)." 64 Fed. Reg. at 38,007. But that declaration merely states that substantial restoration of natural quiet must be achieved during daylight, which on average lasts 12 hours, and that quiet at night (when air tours do not fly) does not count in the calculation. *See Grand Canyon I*, 154 F.3d at 475 n.19. It says nothing about averaging noise over an entire year.

day" means "any given day," and contradicts the FAA's view that it means "the average annual day."[15]

The FAA's "average annual day" interpretation appears to be inconsistent not only with the 2000 NPS Review, but also with the premise of the Park Service's definition of substantial restoration, a premise that the FAA itself has repeatedly endorsed. That premise is that aircraft noise should be regulated to enhance the experience of Park visitors. As we said in *Grand Canyon I*, both the 1994 NPS Report and the notice announcing the 1996 Final Rule were replete with

---

[15] Although the government contends that the 2000 NPS Review is merely a "technical document" that cannot be taken to represent the views of the agency, Resp't's Br. at 51, the review gives every appearance of being authoritative. Indeed, the introduction states that "the National Park Service (NPS) has prepared the following report" in "response to language in [a] House Appropriations Bill." 2000 NPS Review at 4. In any event, whether or not the review is decisive affirmative evidence of the Secretary's view, it creates more than enough doubt to justify a remand.

At oral argument, government counsel also suggested that, because the Park Service is a co-respondent in this case, we should assume that the views expressed in the government's brief regarding the meaning of "the day" are those of the Park Service. Although deference to an agency's interpretation of its own regulation "is not to be withheld merely because the agency's reading of the regulation comes in form of a legal brief," that rule applies only where there is "'no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'" *Drake v. FAA*, 291 F.3d 59, 68 (D.C. Cir. 2002) (quoting *Auer*, 519 U.S. at 462). "In conducting this inquiry, we consider whether the agency has 'ever adopted a different interpretation of the regulation or contradicted its position on appeal.'" *Id.* at 69 (quoting *National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997)). Because the 2000 NPS Review did adopt a different interpretation that contradicts the government's position on appeal, deference to the interpretation contained in the government's brief is inappropriate.

concern for the manner in which aircraft noise affected visitors' experiences. 154 F.3d at 465-66; *see id.* at 466 (noting that "in the Park Service's view, natural quiet is a resource *because* it is relevant to visitor enjoyment"). And as we made clear in Part II.A above, the same is true of the Park Service's explanation of the methodology underlying the Limitations Rule. Indeed, this premise derives in part from the Overflights Act itself, which directed the Secretary of the Interior to issue recommendations "that shall provide for substantial restoration of the natural quiet *and experience of the park.*" Overflights Act § 3(b)(1) (emphasis added).

As the Trust points out, the use of an annual average does not correspond to the experience of the Park's actual visitors. People do not visit the Park on "average" days, nor do they stay long enough to benefit from averaging noise over an entire year. For the typical visitor, who visits the Grand Canyon for just a few days during the peak summer season, the fact that the Park is quiet "on average" is cold comfort. Indeed, the FAA acknowledges that, "[b]ecause many park visitors typically spend limited time in particular sound environments during specific park visits, the amount of aircraft noise present . . . can have great implications for the visitor's opportunity to experience natural quiet in those particular times and spaces." Limitations Rule, 65 Fed. Reg. at 17,712. The problem with an annual average is that it gives equal weight to summer and winter days, notwithstanding that there are many more visitors during the former than the latter. Thus, theoretically the use of an annual average could permit the statutory standard to be met despite an incessantly noisy summer, assuming that the other seasons were relatively quiet. On the FAA's view, it could then declare that it had achieved substantial restoration of natural quiet and cease any further efforts to restrict aircraft noise.

Nor are these consequences of using an annual average merely theoretical. The FAA's Final Supplemental Environmental Assessment projects that the 2000 Final Rules will restore natural quiet in 43.6% of the Park on the "average annual day." *See* FSEA at F-4. The same document, however, reveals that on the average summer day, natural quiet will be substantially restored in only 31.3% of the Park, and that on the day with the most air tour overflights the natural quiet will be substantially restored in only 19.0% of the Park. *Id.* This result appears inconsistent with the rationale that the Park Service offered for its 1994 definition of substantial restoration, and that we found reasonable in *Grand Canyon I*: "Protecting 50% of the Park for 75% of the day gives [backcountry visitors] at least a reasonable chance of seeing the less-traveled areas in peace." 154 F.3d at 467; *see also* 1994 NPS Report at 184.

The FAA's only response to the seeming unreasonableness of its definition is that its standard guidelines for evaluating the impact of aircraft noise employ an annual average, and that the courts have generally deferred to those guidelines. Resp't's Br. at 54-56 (citing, e.g., *City of Bridgeton v. FAA*, 212 F.3d 448, 459 (8th Cir. 2000); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 578-79 (9th Cir. 1998)). But those guidelines were developed to evaluate aircraft noise at *airports*, *see* 14 C.F.R. pt. 150; *id.* § 150.9(b), and it is in that context that the courts have deferred. *See, e.g.*, *Bridgeton*, 212 F.3d at 459; *Morongo Band*, 161 F.3d at 578-79. None of the cited cases involved a statute that required the FAA to achieve substantial restoration of the natural quiet, or to employ a Park Service definition that demands quiet during 75% of "the day."

In sum, we conclude that the FAA's use of an annual average day for measuring "substantial restoration of the natural quiet" appears inconsistent with both the Park Service's definition of the term and with the premise upon which that definition was based. As noted in our discussion of ripeness

above, this is not merely a technical dispute. It has a significant impact both on the FAA's estimate of the progress its current and planned rules make, and on its determination of the end point at which it will have fulfilled the statutory objective. We must therefore remand this issue for further consideration.

We recognize that, on remand, the Park Service may declare that it did in fact choose what seems to us to be the FAA's less reasonable reading of the Service's definition of "substantial restoration." If it does, however, the Park Service must understand that "the Overflights Act . . . did not relieve the government . . . of its obligation not to promulgate a rule that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Grand Canyon I*, 154 F.3d at 469 (quoting 5 U.S.C. § 706(2)(A)). To survive review under that standard, the Service will have to explain why its definition is reasonable in light of the premise upon which it was assertedly based. At this point, the government has offered no explanation at all.

C

The Trust's second challenge is to an aspect of the FAA's noise methodology. The Trust argues that, in projecting the amount of noise experienced by different parts of the Park, the FAA's noise model only considers noise emitted from air tour flights. By failing to account for noise from other aircraft that fly over the Grand Canyon—for example, from commercial jets, general aviation, and military flights—the model arbitrarily overstates how quiet the Park really is. The Trust asserts that if non-tour aircraft noise were included in the calculation, the percentage of the Park in which natural quiet would be substantially restored—even on the FAA's average annual day—would be significantly less than the projected 43.6%.

The FAA does not dispute that it excludes non-tour aircraft from its model, and the Trust's description is in accord with that of the Final Supplemental Environmental Assessment. FSEA app. G, at 40. Nor does the FAA dispute that, at least theoretically, the exclusion of non-tour aircraft could cause it to overestimate the periods when, and number of places where, Park visitors substantially experience natural quiet. The FAA's only response to the Trust's challenge is that excluding non-tour aircraft is reasonable because they "contribute minimal noise compared to commercial air tour aircraft. . . . [The FAA] did not believe the minimal amount of noise they contribute would affect the accuracy of its estimates." Resp't's Br. at 59.

The agency cites no direct evidence that the noise from non-tour aircraft is minimal, basing that conclusion solely on the fact that general aviation flights account "for about 3 percent of all aircraft" in the Park. FSEA app. G, at 40. What is at issue here, however, is not the number of aircraft that fly over the Grand Canyon, but rather the percentage of time that they are audible. Although we might ordinarily defer to the FAA's expert assurance that the number of non-tour aircraft is too small to affect the accuracy of the latter calculation, we cannot defer when the government's own data suggests the contrary. Here, the record evidence indicates that the exclusion of non-tour aircraft from the calculation of the percentage of time that aircraft are audible may well have a significant impact on the results.

The 1994 NPS Report provides a chart, based on actual observations, that breaks down the percentage of time that different types of aircraft were audible at different points in the Park. 1994 NPS Report at 187. For example, it shows that at Lipan Point, total aircraft noise—including noise from air tours, commercial jets, general aviation, and military flights—was audible during 43% of the observation period. Air tours, however, could only be heard 30% of the time. Hence, at that

location, excluding non-tour aircraft from the calculation would overestimate by 13 percentage points the amount of time during which natural quiet prevailed. Other locations reveal similarly significant differentials between the amount of time that some type of aircraft was audible and the amount of time that air tours could be heard: a 14% differential at Bright Angel Point, 10% at Toroweap Overlook, and 12% at Phantom Ranch Overlook. *Id.* When asked at oral argument, the government could offer no explanation for why these differentials were immaterial in calculating the areas or periods in which the Park substantially experiences natural quiet.

The FAA also seeks to defend the exclusion of non-tour aircraft from its noise model on the ground that "FAA's regulations were not required to address every conceivable type of aircraft." Resp't's Br. at 60. That is true, and the FAA can certainly choose to achieve the substantial restoration of natural quiet by regulating air tours alone. But the FAA cannot dispute that whether or not non-tour aircraft are regulated, natural quiet does not exist when the sound they make is audible.[16] Nor does the Overflights Act provide any basis for ignoring noise caused by such aircraft.[17] Hence, the fact that the FAA has chosen not to regulate certain categories of aircraft does not justify ignoring the sound those aircraft make when deciding how extensively to regulate other categories. And in the absence of any

---

[16] *See, e.g.*, 2000 NPS Review at 6 (defining "natural quiet" as "the sound levels associated with a given acoustic environment, absent *any* mechanical or manmade noise sources" (emphasis added)); 1994 NPS Report at 182 (defining "natural quiet" as "no aircraft audible").

[17] *See* Overflights Act § 3(a) (declaring that "[n]oise associated with aircraft overflights at the Grand Canyon National Park is causing a significant adverse effect on the natural quiet and experience of the park").

reasonable justification for excluding non-tour aircraft from its noise model, we must conclude that this aspect of the FAA's methodology is arbitrary and capricious and requires reconsideration by the agency.

IV

For the reasons discussed in Part II, the Air Tour Association's petition for review is denied. For the reasons discussed in Part III, we grant the Grand Canyon Trust's petition and remand the case to the FAA for further proceedings consistent with this opinion.

Appendix B-1

TITLE 16. CONSERVATION
CHAPTER 1. NATIONAL PARKS, MILITARY PARKS, MONUMENTS, AND SEASHORES
NATIONAL PARK SERVICE

16 USCS § 1a-1 (2002)

§ 1a-1. National Park System: administration; declaration of findings and purpose

Congress declares that the national park system, which began with establishment of Yellowstone National Park in 1872, has since grown to include superlative natural, historic, and recreation areas in every major region of the United States, its territories and island possessions; that these areas, though distinct in character, are united through their inter-related purposes and resources into one national park system as cumulative expressions of a single national heritage; that, individually and collectively, these areas derive increased national dignity and recognition of their superb environmental quality through their inclusion jointly with each other in one national park system preserved and managed for the benefit and inspiration of all the people of the United States; and that it is the purpose of this Act to include all such areas in the System and to clarify the authorities applicable to the system. Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System, as defined in section 2 of this Act [16 USCS § 1c], shall be consistent with and founded in the purpose established by the first section of the Act of August 25, 1916 [16 USCS § 1], to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation

of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.

HISTORY:
(Aug. 18, 1970, P.L. 91-383, § 1, 84 Stat. 825; March 27, 1978, P.L. 95-250, § 101(b), 92 Stat. 166.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act Aug. 18, 1970, P.L. 91-383, which appears generally as 16 USCS §§ 1a-1 et seq. For full classification of such Act, consult USCS Tables volumes.

"The Act of August 25, 1916," referred to in this section, is Act Aug. 25, 1916, ch 408, which appears generally as 16 USCS §§ 1 et seq. For full classification of such Act, consult USCS Tables volumes.

Amendments:

1978. Act March 27, 1978, added: "Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System, as defined in section 2 of this Act, shall be consistent with and founded in the purpose established by the first section of the Act of August 25, 1916, to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress."

Other provisions:

Study to determine appropriate minimum altitude for aircraft over National Park System units. Act Aug. 18, 1987, P.L. 100-91, 101 Stat. 674, provides:

Section 1. Study of park overflights.

(a) Study by Park Service. The Secretary of the Interior (hereinafter referred to as the 'Secretary'), acting through the Director of the National Park Service, shall conduct a study to determine the proper minimum altitude which should be maintained by aircraft when flying over units of the National Park System. The Secretary of Transportation, acting through the Administrator of the Federal Aviation Administration (hereinafter referred to as the 'Administrator'), shall provide technical assistance to the Secretary in carrying out the study.

(b) General requirements of study. The study shall identify any problems associated with overflight by aircraft of units of the National Park System and shall provide information regarding the types of overflight which may be impacting on park unit resources. The study shall distinguish between the impacts caused by sightseeing aircraft, military aircraft, commercial aviation, general aviation, and other forms of aircraft which affect such units. The study shall identify those park system units, and portions thereof, in which the most serious adverse impacts from aircraft overflights exist.

(c) Specific requirements. The study under this section shall include research at the following units of the National Park System: Cumberland Island National Seashore, Yosemite National Park, Hawaii Volcanoes National Park [Hawai'i Volcanoes National Park], Haleakala National Park [Haleakal a National Park], Glacier National Park, and Mount Rushmore National Memorial, and at no less than four additional units of

the National Park System, excluding all National Park System units in the State of Alaska. The research at each such unit shall provide information and an evaluation regarding each of the following:

(1) the impacts of aircraft noise on the safety of the park system users, including hikers, rock-climbers, and boaters;

(2) the impairment of visitor enjoyment associated with flights over such units of the National Park System;

(3) other injurious effects of overflights on the natural, historical, and cultural resources for which such units were established; and

(4) the values associated with aircraft flights over such units of the National Park System in terms of visitor enjoyment, the protection of persons or property, search and rescue operations and firefighting.

Such research shall evaluate the impact of overflights by both fixed-wing aircraft and helicopters. The research shall include an evaluation of the differences in noise levels within such units of the National Park System which are associated with flight by commonly used aircraft at different altitudes. The research shall apply only to overflights and shall not apply to landing fields within, or adjacent to, such units.

(d) Report to Congress. The Secretary shall submit a report to the Congress within 3 years after the enactment of this Act containing the results of the study carried out under this section. Such report shall also contain recommendations for legislative and regulatory action which could be taken regarding the information gathered pursuant to paragraphs (1) through (4) of subsection (c). Before submission to the Congress, the Secretary shall provide a draft of the report and

recommendations to the Administrator for review. The Administrator shall review such report and recommendations and notify the Secretary of any adverse effects which the implementation of such recommendations would have on the safety of aircraft operations. The Administrator shall consult with the Secretary to resolve issues relating to such adverse effects. The final report shall include a finding by the Administrator that implementation of the recommendations of the Secretary will not have adverse effects on the safety of aircraft operations, or if the Administrator is unable to make such finding, a statement by the Administrator of the reasons he believes the Secretary's recommendations will have an adverse effect on the safety of aircraft operations.

(e) FAA review of rules. The Administrator shall review current rules and regulations pertaining to flights of aircraft over units of the National Park System at which research is conducted under subsection (c) and over any other such units at which such a review is determined necessary by the Administrator or is requested by the Secretary. In the review under this subsection, the Administrator shall determine whether changes are needed in such rules and regulations on the basis of aviation safety. Not later than 180 days after the identification of the units of the National Park System for which research is to be conducted under subsection (c), the Administrator shall submit a report to Congress containing the results of the review along with recommendations for legislative and regulatory action which are needed to implement any such changes.

(f) Authorization. There are authorized to be appropriated such sums as may be necessary to carry out the studies and review under this section.

Sec. 2. Flights over Yosemite and Haleakala during study and review.

(a) Yosemite National Park. During the study and review periods provided in subsection (c), it shall be unlawful for any fixed wing aircraft or helicopter flying under visual flight rules to fly at an altitude of less than 2,000 feet over the surface of Yosemite National Park. For purposes of this subsection, the term 'surface' refers to the highest terrain within the park which is within 2,000 feet laterally of the route of flight and with respect to Yosemite Valley such term refers to the upper-most rim of the valley.

(b) Haleakala National Park [Haleakal a National Park]. During the study and review periods provided in subsection (c), it shall be unlawful for any fixed wing aircraft or helicopter flying under visual flight rules to fly at an altitude below 9,500 feet above mean sea level over the surface of any of the following areas in Haleakala National Park [Haleakal a National Park]: Haleakala Crater, Crater Cabins, the Scientific Research Reserve, Halemauu Trail, Kaupo Gap Trail, or any designated tourist viewpoint.

(c) Study and review periods. For purposes of subsections (a) and (b), the study period shall be the period of the time after the date of enactment of this Act and prior to the submission of the report under section 1 The review period shall comprise a 2-year period for Congressional review after the submission of the report to Congress.

(d) Exceptions. The prohibitions contained in subsections (a) and (b) shall not apply to any of the following:

(1) emergency situations involving the protection of persons or property, including aircraft;

(2) search and rescue operations;

(3) flights for purposes of firefighting or for required administrative purposes; and

(4) compliance with instructions of an air traffic controller.

(e) Enforcement. For purposes of enforcement, the prohibitions contained in subsections (a) and (b) shall be treated as requirements established pursuant to section 307 of the Federal Aviation Act of 1958 [former 49 USCS Appx § 1348]. To provide information to pilots regarding the restrictions established under this Act, the Administrator shall provide public notice of such restrictions in appropriate Federal Aviation Administration publications as soon as practicable after the enactment of this Act.

Sec. 3. Grand Canyon National Park.

(a) Noise associated with aircraft overflights at the Grand Canyon National Park is causing a significant adverse effect on the natural quiet and experience of the park and current aircraft operations at the Grand Canyon National Park have raised serious concerns regarding public safety, including concerns regarding the safety of park users.

(b) Recommendations.

(1) Submission. Within 30 days after the enactment of this Act, the Secretary shall submit to the Administrator recommendations regarding actions necessary for the protection of resources in the Grand Canyon from adverse impacts associated with aircraft overflights. The recommendations shall provide for substantial restoration of the natural quiet and experience of the park and protection of public health and safety from adverse effects associated with aircraft overflight. Except as provided in subsection (c), the recommendations shall contain provisions prohibiting the flight of aircraft below

the rim of the Canyon, and shall designate flight free zones. Such zones shall be flight free except for purposes of administration and for emergency operations, including those required for the transportation of persons and supplies to and from Supai Village and the lands of the Havasupai Indian Tribe of Arizona. The Administrator, after consultation with the Secretary, shall define the rim of the Canyon in a manner consistent with the purposes of this paragraph.

(2) Implementation. Not later than 90 days after receipt of the recommendations under paragraph (1) and after notice and opportunity for hearing, the Administrator shall prepare and issue a final plan for the management of air traffic in the air space above the Grand Canyon. The plan shall, by appropriate regulation, implement the recommendations of the Secretary without change unless the Administrator determines that implementing the recommendations would adversely affect aviation safety. If the Administrator determines that implementing the recommendations would adversely affect aviation safety, he shall, not later than 60 days after making such determination, in consultation with the Secretary and after notice and opportunity for hearing, review the recommendations consistent with the requirements of paragraph (1) to eliminate the adverse effects on aviation safety and issue regulations implementing the revised recommendations in the plan. In addition to the Administrator's authority to implement such regulations under the Federal Aviation Act of 1958 [former 49 USCS Appx §§ 1301 et seq. generally; for full classification consult USCS Tables volumes], the Secretary may enforce the appropriate requirements of the plan under such rules and regulations applicable to the units of the National Park System as he deems appropriate.

(3) Report. Within 2 years after the effective date of the plan required by subsection (b)(2), the Secretary shall submit to the Congress a report discussing—

(A) whether the plan has succeeded in substantially restoring the natural quiet in the park; and

(B) such other matters, including possible revisions in the plan, as may be of interest.

The report shall include comments by the Administrator regarding the effect of the plan's implementation on aircraft safety.

(c) Helicopter flights of river runners. Subsection (b) shall not prohibit the flight of helicopters—

(1) which fly a direct route between a point on the north rim outside of the Grand Canyon National Park and locations on the Hualapai Indian Reservation (as designated by the Tribe); and

(2) whose sole purpose is transporting individuals to or from boat trips on the Colorado River and any guide of such a trip.

Sec. 4. Boundary Waters Canoe Area Wilderness.

The Administrator shall conduct surveillance of aircraft flights over the Boundary Waters Canoe Area Wilderness as authorized by the Act of October 21, 1978 (92 Stat. 1649-1659) [generally unclassified, but see 16 USCS §§ 1132 note and 1133(d)(5), (8)] for a period of not less than 180 days beginning within 60 days of enactment of this Act. In addition to any actions the Administrator may take as a result of such surveillance, he shall provide a report to the Committee on Interior and Insular Affairs and the Committee on Public Works and Transportation of the United States House of Representatives and to the Committee on Energy and Natural Resources and the Committee on Commerce, Science, and

Transportation of the United States Senate. Such report is to be submitted within 30 days of completion of the surveillance activities. Such report shall include but not necessarily be limited to information on the type and frequency of aircraft using the airspace over the Boundary Waters Canoe Area Wilderness.

Sec. 5. Assessment of National Forest System wilderness overflights.

(a) Assessment by Forest Service. The Chief of the Forest Service (hereinafter referred to as the 'Chief') shall conduct an assessment to determine what, if any, adverse impacts to wilderness resources are associated with overflights of National Forest System wilderness areas. The Administrator of the Federal Aviation Administration shall provide technical assistance to the Chief in carrying out the assessment. Such assessment shall apply only to overflight of wilderness areas and shall not apply to aircraft flights or landings adjacent to National Forest System wilderness units. The assessment shall not apply to any National Forest System wilderness units in the State of Alaska.

(b) Report to Congress. The Chief shall submit a report to Congress within 2 years after enactment of this Act containing the results of the assessments carried out under this section.

(c) Authorization. Effective October 1, 1987, there are authorized to be appropriated such sums as may be necessary to carry out the assessment under this section.

Sec. 6. Consultation with Federal agencies.

"In conducting the study and the assessment required by this Act, the Secretary of the Interior and the Chief of the Forest Service shall consult with other Federal agencies that are

engaged in an analysis of the impacts of aircraft overflights over federally-owned land.".

Removal of feral burros and horses from Death Valley National Monument. Act Oct. 5, 1992, P.L. 102-381, Title I, 106 Stat. 1384, provides: "In fiscal year 1993 and thereafter, the National Park Service may use helicopters and motorized equipment at Death Valley National Monument for removal of feral burros and horses.".

Air traffic over Grand Canyon. Act Oct. 31, 1992, P.L. 102-581, Title I, § 134, 106 Stat. 4887, provides:

(a) Study. The Administrator of the Federal Aviation Administration, in consultation with the Director of the National Park Service, the State of Arizona, the State of Nevada, the Clark County Department of Aviation, affected Indian tribes, and the general public, shall conduct a study on increased air traffic over Grand Canyon National Park.

(b) Report. The Administrator of the Federal Aviation Administration shall submit to Congress a report on the results of the study conducted under subsection (a). The report shall include the following:

(1) A report on the increase in air traffic over Grand Canyon National Park since 1987.

(2) A forecast of the increase in air traffic over Grand Canyon National Park through 2010.

(3) A report on the carrying capacity of the airspace over Grand Canyon National Park to ensure aviation safety and to meet the requirements established by section 3 of the Act of August 18, 1987 (Public Law 100-91; 101 Stat. 676) [note to

this section], including the substantial restoration of natural quiet at the Park.

(4) A plan of action to manage increased air traffic over Grand Canyon National Park to ensure aviation safety and to meet the requirements established by such section 3 of the Act of August 18, 1987 [note to this section], including any measures to encourage or require the use of quiet aircraft technology by commercial air tour operators.

* * * *

Appendix C-1

5 USCS § 601

* * *

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS

* * *

5 USCS § 601 (2002)

§ 601. Definitions

For purposes of this chapter [5 USCS §§ 601 et seq.]—

(1) the term "agency" means an agency as defined in section 551(1) of this title;

(2) the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term "rule" does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;

(3) the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small

Business Act [15 USCS § 632], unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(4) the term "small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(5) the term "small governmental jurisdiction" means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register;

(6) the term "small entity" shall have the same meaning as the terms "small business", "small organization" and "small governmental jurisdiction" defined in paragraphs (3), (4) and (5) of this section; [and]

(7) the term "collection of information"—

(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either—

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the United States; or

(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

(B) shall not include a collection of information described under section 3518(c)(1) of title 44, United States Code. [; and]

(8) Recordkeeping requirement. The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records.

* * *

Appendix C-4

5 USCS § 602

* * *

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS

* * *

5 USCS § 602 (2002)

§ 602. Regulatory agenda

(a) During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain—

(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;

(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking, and

(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).

(b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.

(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.

(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

* * *

Appendix C-6

5 USCS § 603

* * *

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS

* * *

5 USCS § 603 (2002)

§ 603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter [5 USCS §§ 601 et seq.] applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

(b) Each initial regulatory flexibility analysis required under this section shall contain—

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

* * *

Appendix C-9

5 USCS § 604

* * *

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS

* * *

5 USCS § 604 (2002)

§ 604. Final regulatory flexibility analysis

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain—

(1) a succinct statement of the need for, and objectives of, the rule;

(2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

(5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

* * *

Appendix C-11

5 USCS § 605

* * *

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS

* * *

5 USCS § 605 (2002)

§ 605. Avoidance of duplicative or unnecessary analyses

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

* * *

Appendix C-13

5 USCS § 606

* * *

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS

* * *

5 USCS § 606 (2002)

§ 606. Effect on other law

The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action.

* * *

Appendix C-14

5 USCS § 607

* * *

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS

* * *

5 USCS § 607 (2002)

§ 607. Preparation of analyses

In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

* * *

Appendix C-15

5 USCS § 608

* * *

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS

* * *

5 USCS § 608 (2002)

§ 608. Procedure for waiver or delay of completion

(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred

and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.

* * *

Appendix C-17

5 USCS § 609

* * *

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS

* * *

5 USCS § 609 (2002)

§ 609. Procedures for gathering comments

(a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as—

(1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;

(3) the direct notification of interested small entities;

(4) the conduct of open conferences or public hearings concerning the rule of small entities including soliciting and receiving comments over computer networks; and

(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

(b) Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct by this chapter [5 USCS §§ 601 et seq.]—

(1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;

(2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule;

(3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;

(4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency

after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);

(5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

(6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required.

(c) An agency may in its discretion apply subsection (b) to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.

(d) For purposes of this section, the term "covered agency" means the Environmental Protection Agency and the Occupational Safety and Health Administration of the Department of Labor.

(e) The Chief Counsel for Advocacy, in consultation with the individuals identified in subsection (b)(2), and with the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, may waive the requirements of subsections (b)(3), (b)(4), and (b)(5) by including in the rulemaking record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:

(1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.

(2) Special circumstances requiring prompt issuance of the rule.

(3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.

* * *

Appendix C-21

5 USCS § 610

* * *

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS

* * *

5 USCS § 610 (2002)

§ 610. Periodic review of rules

(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter, within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may

extend the completion date by one year at a time for a total of not more than five years.

(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors—

(1) the continued need for the rule;

(2) the nature of complaints or comments received concerning the rule from the public;

(3) the complexity of the rule;

(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

(c) Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.

* * *

Appendix C-23

5 USCS § 611

* * *

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS

* * *

5 USCS § 611 (2002)

§ 611. Judicial review

(a) (1) For any rule subject to this chapter [5 USCS §§ 601 et seq.], a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7 [5 USCS §§ 701 et seq.]. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7 [5 USCS §§ 701 et seq.]. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(3) (A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced

before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than—

(i) one year after the date the analysis is made available to the public, or

(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7 [5 USCS §§ 601 et seq., 701 et seq.], including, but not limited to—

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4),

shall constitute part of the entire record of agency action in connection with such review.

(c) Compliance or noncompliance by an agency with the provisions of this chapter [5 USCS §§ 601 et seq.] shall be subject to judicial review only in accordance with this section.

(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

* * *

Appendix C-26

5 USCS § 612

* * *

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS

* * *

5 USCS § 612 (2002)

§ 612. Reports and intervention rights

(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter [5 USCS §§ 601 et seq.] and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter [5 USCS §§ 601 et seq.], the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.

(c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).

* * *

Appendix D-1

5 USCS § 701

* * *

TITLE 5. GOVERNMENT ORGANIZATION
AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 7. JUDICIAL REVIEW

* * *

5 USCS § 701 (2002)

§ 701. Application; definitions

(a) This chapter [5 USCS §§ 701 et seq.] applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter [5 USCS §§ 701 et seq.]—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41 [41 USCS §§ 101 et seq.]; subchapter II of chapter 471 of title 49 [49 USCS §§ 47151 et seq.]; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix, and

(2) "person," "rule," "order," "license," "sanction," "relief," and "agency action" have the meanings given them by section 551 of this title.

* * *

Appendix D-3

5 USCS § 702

* * *

TITLE 5. GOVERNMENT ORGANIZATION
AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 7. JUDICIAL REVIEW

* * *

5 USCS § 702 (2002)

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

* * *

Appendix D-4

5 USCS § 703

* * *

TITLE 5. GOVERNMENT ORGANIZATION
AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 7. JUDICIAL REVIEW

* * *

5 USCS § 703 (2002)

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

* * *

Appendix D-5

5 USCS § 704

* * *

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 7. JUDICIAL REVIEW

* * *

5 USCS § 704 (2002)

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

* * *

Appendix D-6

5 USCS § 705

* * *

TITLE 5. GOVERNMENT ORGANIZATION
AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 7. JUDICIAL REVIEW

* * *

5 USCS § 705 (2002)

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

* * *

Appendix D-7

5 USCS § 706

* * *

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 7. JUDICIAL REVIEW

* * *

5 USCS § 706 (2002)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

* * *

Appendix E–1

49 USCS § 46110

* * *

TITLE 49. TRANSPORTATION
SUBTITLE VII. AVIATION PROGRAMS
PART A. AIR COMMERCE AND SAFETY
SUBPART IV. ENFORCEMENT AND PENALTIES
CHAPTER 461. INVESTIGATIONS AND PROCEEDINGS

* * *

49 USCS § 46110 (2002)

§ 46110. Judicial review

(a) Filing and venue. Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation safety duties and powers designated to be carried out by the Administrator) under this part [49 USCS §§ 40101 et seq.] may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures. When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Under Secretary, or Administrator, as appropriate. The Secretary, Under Secretary, or Administrator shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of court. When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection. In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review. A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

* * *

Appendix F-1

DEPARTMENT OF TRANSPORTATION (DOT)

Federal Aviation Administration (FAA)

14 CFR Part 93

[Docket No. FAA-99-5927; Amdt. No. 93-81]

2120-AG73

Commercial Air Tour Limitation in the Grand Canyon National Park Special Flight Rules Area

Part II

65 FR 17708

DATE: Tuesday, April 4, 2000

ACTION: Final rule.

SUMMARY: This final rule limits the number of commercial air tours that may be conducted in the Grand Canyon National Park Special Flight Rules Area (SFRA) and revises the reporting requirements for commercial air tours in the SFRA. These changes allow the FAA and the National Park Service (NPS) to limit and further assess the impact of aircraft noise on the Grand Canyon National Park (GCNP). In addition, this action adopts non-substantive changes to 14 CFR part 93, subpart U to improve the organization and clarity of the rule. This rule is one part of an overall strategy to control aircraft noise on the part environment and to assist the NPS to achieve the statutory mandate imposed by the National Parks

Overflights Act to provide substantial restoration of the natural quiet and experience of the park.

DATES: The effective date for the final rule is May 4, 2000.

Compliance with § 93.325. Until the start of the third quarter (July-September) reports will be due as follows: 30 days after the close of the first trimester (January-April); 30 days after the end of June for the May-June time period. Thereafter, reports are due 30 days after the close of the quarter. FOR FURTHER INFORMATION CONTACT: Alberta Brown, AFS-200, Office of Flight Standards, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; Telephone: (202) 267-8321.

SUPPLEMENTARY INFORMATION:

Availability of Final Rules

Any person may obtain a copy of this Final Rule by submitting a request to the Federal Aviation Administration, Office of Rulemaking, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-9677. Communications must identify the notice number of this Final Rule. An electronic copy of this document may be downloaded using a modem and suitable communications software from the FAA regulations section of the Fedworld electronic bulletin board service (telephone: (703) 321-3339) or the Federal Register's electronic bulletin board service (telephone: (202) 512-1661). Internet users may access the FAA's Internet site at http://www.faa.gov or the Federal Register's Internet site at http://www.access.gpo.gov/su_docs for access to recently published rulemaking documents.

This final rule constitutes final agency action under 49 U.S.C. 46110. Any party to this proceeding, having a

substantial interest may appeal the order to the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within 60 days after issuance of this Order.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, requires the FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may contact their local FAA official. Internet users can find additional information on SBREFA in the "Quick Jump" section of the FAA's web page at http://www.faa.gov and may electronic inquiries to the following Internet address: 9-AWA-SBREFA@faa.gov.

I. History

A. FAA's Actions

Beginning in the summer of 1986, the FAA initiated regulatory action to address increasing air traffic over the GCNP. On March 26, 1987, the FAA issued Special Federal Aviation Regulation (SFAR) No. 50 establishing a special flight rules area and other flight regulations in the vicinity of the GCNP (52 FR 9768). The purpose of the SFAR was to reduce the risk of midair collision and decrease the risk of terrain contact accidents below the rim level. These requirements were modified and extended by SFAR 50-1 (52 FR 22734; June 15, 1987).

In 1987 Congress enacted Public Law (Pub. L.) 100-91, commonly known as the National Parks Overflights Act. Public Law 100-91 stated, in part, that "noise associated with

aircraft overflights at Grand Canyon National Park [was] causing a significant adverse effect on the natural quite and experience of the park and current aircraft operations at the Grand Canyon National Park have raised serious concerns regarding public safety, including concerns regarding the safety of park users."

Section 3 of Public Law 100-91 required the Department of Interior (DOI) to submit to the FAA recommendations to protect resources in the Grand Canyon from adverse impacts associated with aircraft overflights. The law mandated that the recommendations provide for, in part, "substantial restoration of the natural quiet and experience of the park and protection of public health and safety from adverse effects associated with aircraft overflight."

In December 1987, the DOI transmitted its "Grand Canyon Aircraft Management Recommendation" to the FAA, which included both rulemaking and non-rulemaking actions. Public Law 100-91 required the FAA to prepare and issue a final plan for the management of air traffic above the Grand Canyon, implementing the recommendations of DOI without change unless the FAA determined that executing the recommendations would adversely affect aviation safety.

On May 27, 1988, the FAA issued SFAR No. 50-2, revising the procedures for aircraft operation in the airspace above the Grand Canyon (53 FR 20264; June 2, 1988). SFAR No. 50-2 did the following: (1) Extended the Special Flight Rules Area (SFRA) from the surface to 14,499 feet above mean sea level (MSL) in the area of the Grand Canyon; (2) prohibited flight below a certain altitude in each of the five sectors of this area, with certain exceptions; (3) established four flight-free zones from the surface to 14,499 feet MSL; (4) provided for special routes for air tours; and (5) contained certain communications requirements for flights in the area.

A second major provision of section 3 of Public Law 100-91 required the DOI to submit a report to Congress discussing "whether the plan has succeeded in substantially restoring the natural quiet in the part; and * * * such other matters, including possible revisions in the plan, as may be of interest." On September 12, 1994, the DOI submitted its final report and recommendations to Congress. This report, entitled, "Report on Effects of Aircraft Overflights on the National Park System" (Report to Congress), was published in July, 1995. The Report to Congress recommended numerous revisions to SFAR No. 50-2 in order to substantially restore natural quiet the GCNP.

Recommendation No. 10, which is of particular interest to this rulemaking, states: "Improve SFAR 50-2 to Effect and Maintain the Substantial Restoration of Natural Quiet at Grand Canyon National Park." This recommendation incorporated the following general concepts: simplification of the commercial sightseeing route structure; expansion of the flight-free zones; accommodation of the forecasted growth in the air tour industry; phase-in of noise efficient/quiet technology aircraft; temporal restrictions ("flight-free" time periods); use of the full range of methods and tools for problem solving; and institution of changes in approaches to park management, including the establishment of an acoustic monitoring program by the NPS in coordination with the FAA.

On June 15, 1995, the FAA published a final rule that extended the provisions of SFAR No. 50-2 to June 15, 1997 (60 FR 31608), pending implementation of the final rule adopting DOI's recommendations.

On December 31, 1996, the FAA issued the final rule (61 FR 69302) implementing many of the recommendations set forth in the DOI report including: flight-free zones and corridors; minimum flight altitudes; general operating

procedures, curfews in the Dragon and Zuni Point corridors; reporting requirements; and a cap on the number of "commercial sightseeing" aircraft that could operate in the SFRA.

This final rule was issued concurrently with a Notice of Proposed Rulemaking (NPRM) regarding Noise Limitations for Aircraft Operations in the Vicinity of Grand Canyon National Park; a Notice of Availability of Proposed Commercial Air Tour Routes for Grand Canyon National Park and Request for Comments; and an Environmental Assessment and Request for Comments; and an Environmental Assessment. The final rule was originally to become effective May 1, 1997. On February 26, 1997, the FAA delayed the effective date until January 31, 1998 (62 FR 8861), for those portions of the December 31, 1996, final rule which define the Grand Canyon SFRA (14 CFR § 93.301), define the flight-free zones and flight corridors (14 CFR § 93.305), and establish minimum flight altitudes in the vicinity of the GCNP (14 CFR § 93.307). The February 26, 1997, final rule also reinstated the corresponding sections of SFAR 50-2 until January 31, 1998 (flight-free zones, the Special Flight Rules Area, and minimum flight altitudes). On December 17, 1997, the effective date for these sections was delayed to January 31, 1999 (62 FR 66248). On December 7, 1998, the effective date for 14 CFR §§ 93.301, 93.305, and 93.307, was delayed until January 31, 2000 (63 FR 67543).

The FAA's final rule published in 1996 was challenged before the U.S. Court of Appeals for the District of Columbia Circuit by the following petitioners: Grand Canyon Air Tour Coalition; the Clark County Department of Aviation and the Las Vegas Convention and Visitors Authority; the Hualapai Indian Tribe; and seven environmental groups led by the Grand Canyon Trust. *See Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455 (D.C. Cir., 1998). The Court ruled in favor of the FAA and upheld the final rule.

B. Interagency Working Group

On December 22, 1993, Secretary of Transportation, Federico Pena, and Secretary of the Interior, Bruce Babbitt, formed an interagency working group (IWG) to explore ways to limit or reduce the impacts for overflights on national parks, including the GCNP. Secretary Babbitt and Secretary Pena concurred that increased flight operations at GCNP and other national parks have significantly diminished the national park experience for some park visitors, and that measures can and should be taken to preserve a quality park experience for visitors, while providing access to the airspace over the national parks.

C. President's Memorandum

The President, on April 22, 1996, issued a Memorandum for the Heads of Executive Departments and Agencies to address the impact of transportation in national parks. Specifically, the President directed the Secretary of Transportation to issue regulations for the GCNP that would place appropriate limits on sightseeing aircraft to reduce the noise immediately, and to make further substantial progress towards restoration of natural quiet, as defined by the Secretary of the Interior, while maintaining aviation safety in accordance with Public Law 100-91.

This memorandum also indicated that, with regard to overflights of the GCNP, "should any final rulemaking determine that issuance of a further management plan is necessary to substantially restore natural quiet in the Grand Canyon National Park, [the Secretary of Transportation, in consultation with heads of relevant departments and agencies] will complete within 5 years a plan that addresses how the Federal Aviation Administration and the National Park Service"

will achieve the statutory goal not more than 12 years from the date of the directive (i.e., 2008).

D. Proposed Rules

On July 9, 1999, the FAA published two NPRMs (Notice 99-11 and Notice 99-12) in accordance with Public Law 100-91, which directs the FAA to implement NPS recommendations to provide for the substantial restoration of natural quiet and experience in GCNP by reducing the impact of aircraft noise from commercial air tours on the GCNP.

Notice 99-11, Modification of the Dimensions of the Grand Canyon National Park Special Flight Rules Area and Flight Free Zones (64 FR 37296, Docket No. 5926) proposed to modify the dimensions of the GCNP SFRA. The proposed changes to the SFRA would modify the eastern portion of the SFRA, the Desert View Flight-free Zone (FFZ), the Bright Angel FFZ and the Sanup FFZ. Notice 99-12, Commercial Air Tour Limitations in the Grand Canyon National Park Special Flight Rules Area, (64 FR 37304, Docket No. 5927) proposed to limit the number of commercial air tours that may be conducted in the SFRA and to revise the reporting requirements for commercial operations in the SFRA.

While the FAA sought comment on all parts of the NPRMs, there were a number of matters in Notice 99-12 that the FAA specifically requested commenters to address: (1) Whether the FAA should use a 5 month peak season (May-Sept), a three month peak season (July-September), or no peak season for purposes of assigning allocations? (2) Whether the time reported on the quarterly report should be expressed in Universal Coordinated Time (UTC), Mountain Standard Time, or another time measurement? (3) Whether reporting should be imposed as a condition of an FAA Form 7711-1 and, if so, whether the requirements of proposed § 93.325 would be

appropriate for such operations? (4) Whether 180 days is a proper measurement of time for the use or lose provision proposed in § 93.321? (5) Whether the initial allocation reflects business operations as of the date of this notice? (6) Whether the allocations should remain unchanged for any specific period of time?

The FAA, in cooperation with the NPS and the Hualapai Indian Tribe, prepared a draft Supplemental Environmental Assessment (SEA) for the proposed rules to assure conformance with the National Environmental Policy Act (NEPA) of 1969, as amended, and other applicable environmental laws and regulations. Copies of the draft SEA were circulated to interested parties and placed in the Docket, where it was available for review. On July 9, 1999, the Notice of Availability of the Draft Supplemental Environmental Assessment for the Proposed Actions Relating to the Grand Canyon National Park was published in the Federal Register (64 FR 37192). Comments on the draft SEA were to be received on or before September 7, 1999. Comments received in response to this Notice of Availability have been addressed in the final SEA published concurrently with this final rule. Based upon the final SEA and careful review of the public comments to the draft SEA, the FAA has determined that a finding of no significant impact (FONSI) is warranted. The final SEA and the FONSI were issued during February 2000. Copies have been placed in the public docket for this rulemaking, have been circulated in interested parties, and may be inspected at the same time and location as this final rule.

On July 20, 1999 (64 FR 38851), the FAA published a notice announcing two public meetings on the NPRM. The meetings, which were held on August 17 and 19, 1999, in Flagstaff, AZ and Las Vegas, NV, respectively, sought additional comment on the NPRMs and on the draft supplemental environmental assessment.

II. Background

The agencies have analyzed the noise situation at the GCNP and decided that a greater effort must be made to reach the statutory goals of Public Law 100-91, especially in light of the President's Memorandum. Noise generated by aircraft conducting commercial air tours presents a specific type of problem because these aircraft generally are operated repeatedly at low altitudes over the same routes. Thus, the FAA issued its 1996 final rule and instituted the aircraft cap as a means to limit aircraft noise generated by air tours.

In the 1996 final rule, however, the FAA underestimated the number of aircraft operated in the SFRA by commercial air tour operators. This problem was identified in the Notice of Clarification issued October 31, 1997 (62 FR 58898). In fact, the FAA concluded in this Notice that "there is enough excess capacity in terms of aircraft numbers for air tours to increase by 3.3 percent annually for the next twelve years if the demand exists (62 FR 58902)." The FAA stated that, "in the aggregated and for most individual operators, the number of air tours provided can continue to increase while the number of aircraft remains the same." In view of this conclusion, the IWG recommended that the FAA and NPS develop a rule that will temporarily limit commercial air tours in the GCNP SFRA at the level reported by the air tour operators for the period May 1, 1997 through April 30, 1998.

The agencies' goal through this rulemaking is to prevent an increase in aircraft noise by limiting the number of commercial air tours. Concurrently with this final rule, the FAA also is issuing a Notice of Availability of Routes which includes certain modifications to aircraft routes through the SFRA, and a final rule modifying airspace in the SFRA. Additionally, the FAA is issuing a Final Supplemental Environmental

Assessment which assesses the environmental impact of the route modifications, the commercial air tours limitation and the airspace modifications. The FAA also continues to work on the rulemaking initiated on December 31, 1996 proposing quiet technology aircraft. All of these steps are aimed at controlling or reducing the impact of aircraft noise in the GCNP.

In addition to preventing the noise situation from increasing, controlling the overall number of commercial air tours in the GCNP SFRA will facilitate the analysis of noise conditions in the GCNP and aid in the development of the noise management plan.

For purposes of determining substantial restoration of natural quiet, the noise modeling in the SEA is premised on the NPS' noise evaluation methodology for GCNP, which was published in the Federal Register on January 26, 1999 (64 FR 3969). The NPS formally adopted this methodology on July 14, 1999 (64 FR 38006).

III. Comment Discussion and Final Action

At the close of the comment period, over 1,000 comments were received on Notice 99-11 and 556 comments were received on Notice 99-12. Many commenters sent identical comments to both dockets. Comments included form letters sent from the air tour industry and from supporters of environmental groups. Comments were also received from industry associations (e.g., Grand Canyon Air Tour Council (GCATC), Aircraft Owners and Pilots Association (AOPA); Helicopter Association International (HAI), Experimental Aircraft Association (EAA); National Air Transport Association (NATA); an environmental coalition (Sierra Club; Grand Canyon Trust; The Wilderness Society; Friends of the Grand Canyon; Maricopa Audubon Society; National Parks and Conservation Association; Nature Sounds Society; Quiet Skies

Alliance); river rafting organizations (Arizona Raft Adventures (ARA); Grand Canyon River Guides); air tour operators (Airstar Helicopters; Grand Canyon Airlines; Heli USA Airways, Inc.; Papillon Grand Canyon Helicopters; Southwest Safaris); aircraft manufacturers (Twin Otter International, Ltd.; Stemme USA, Inc.); tourism organizations (Grand Canyon Air Tourism Association; Arizona Office of Tourism; Flagstaff Chamber of Commerce); government officials (Arizona Speaker of the House; Arizona State Legislature; Governor Hull of Arizona; Arizona Corporation Commission; Senator Harry Reid of Nevada; Clark County Department of Aviation); and representatives of Native American Tribes (Hualapai Tribe; Havasupai Tribe; Grand Canyon Resort Corporation (GCRC)). Some of the substantive comments include commissioned studies, economic analysis and noise impact analyses (J.R. Alberti Engineers; Riddel & Schwer).

A. Modification of SFAR 50-2

A number of air tour operators and elected officials state that SFAR 50-2 is working well and generally oppose further regulation.

AOPA and EAA state that current rules under SFAR 50-2 should be maintained without modification.

In contrast, all environmental groups point out that further regulation is necessary to bring the GCNP into compliance with Public Law 100-91.

FAA Response: This regulatory action is a further response to the legislative mandate set forth in Public Law 100-91 and the President's 1996 Executive Memorandum-to substantially restore natural quiet and experience in GCNP. The NPS Report to Congress was based on a number of studies evaluating whether SFAR 50-2 resulted in a substantial restoration of

natural quiet. As discussed in the final rule in 1996 (Docket 28537, December 31, 1996; 61 FR 69302), NPS found that SFAR 50-2 had not resulted in substantial restoration of natural quiet. In that rule the FAA stated, "An NPS analysis using 1989 FAA survey data of commercial sightseeing route activity indicated that 43 percent of GCNP met the NPS criterion for substantially restoring natural quiet. However, a subsequent NPS analysis using 1995 FAA survey data indicated that 31 percent of GCNP met the NPS criterion for substantially restoring natural quiet." These findings led the NPS to conclude that the noise mitigation benefits of SFAR 50-2 were being significantly eroded.

Hence, in 1996, the FAA, in cooperation with NPS, adopted the 1996 Final Rule creating a number of flight-free zones, a curfew in the Dragon and Zuni Point corridors and imposing a cap on the number of aircraft used by each certificate holder in the GCNP SFRA. In the final rule, the FAA estimated that the regulations adopted in 1996 together with the phase out of noisier aircraft would provide substantial restoration of natural quiet by 2008. *See* 61 FR 69328. However, the Environmental Assessment for this rule was based on a different noise methodology. This methodology was set forth in Figure 4-4 of the EA.

In 1997, however, the FAA issued a Notice of Clarification indicating that the number of aircraft available to operators in the SFRA had been underestimated and thus the aircraft cap was not an adequate surrogate for limiting growth. The FAA found in the Notice that "the impact of increased air tour operations as analyzed in the Written Reevaluation of the Environmental Assessment, serves to reduce the percentage of the GCNP that will achieve substantial restoration of natural quiet * * * when compared to what was originally assumed in the Final EA." Notice of Clarification, 62 FR 58898, 58905 (October 31, 1997).

Subsequent to the Notice of Clarification, the FAA and NPS concluded that further regulatory action was necessary to ensure the substantial restoration of natural quiet and experience in accordance with Public Law 100-91. Thus, this rulemaking together with the airspace modifications adopted in Docket FAA-99-5926 and the adoption of the new SFAR route structure will move the GCNP closer towards the goal of substantial restoration of natural quiet. As documented by the 2000 Supplemental Environmental Assessment, however, the goal of substantial restoration of natural quiet will not be met by these combined rulemakings.

B. Negotiated Rulemaking

A number of commenters, especially those representing air tour operator interests, Clark County Department of Aviation and elected officials inquired as to why the FAA chose to embark upon this rulemaking instead of using the negotiated rulemaking process.

HAI says that the proposed restrictions undermine efforts to achieve consensus on management of air tour overflights of national parks. According to HAI, the future of GCNP overflight rulemaking lies in a process of open, public conversation to seek ways in which the many legitimate, conflicting interests at stake can be balanced and accommodated to the fullest practicable extent. HAI states that the current proposals are large steps in the wrong direction, representing illogical, arbitrary, and unworkable impositions on an already strained process. HAI says that the current proposals for harsh new restrictions undermine the air tour community's hope for reasoned discussion of divergent points of view among persons of good will.

Clark County Department of Aviation (Clark County) criticizes the FAA for failing to develop its proposed rules

without extensive and meaningful input from all affected stakeholders. Clark County states that the FAA has repeatedly rejected invitations from Clark County and others to initiate a negotiated rulemaking process.

FAA Response: The FAA notes that this rulemaking requires it to make very difficult decisions that significantly impact small businesses in order to comply with the statutory mandate to substantially restore natural quiet and experience in GCNP. Because of the nature of the issues involved, both the FAA and NPS have reached out to affected parties to try to achieve a workable solution.

For example, in an attempt to work with the stakeholders, the FAA and NPS held a public meeting in Flagstaff, AZ on April 28, 1998. Participants in this group included representatives of air tour operators, environmental groups, Native American Tribes, and local Las Vegas and Tusayan government officials. The group was asked to comment on the agencies then proposed route structure and to use the time together to negotiate a better solution, if the members did not like the proposal. The scheduled two day meeting lasted less than a day as most stakeholders held firm to their established positions and were unwilling to negotiate. Most parties were not willing to even consider another route structure, nor were they willing to consider participating in another group discussion or possible mediation.

A subsequent meeting was held on July 15, 1998 between the FAA and the Hualapai Tribe in Peach Springs, Arizona to discuss a tentative air tour route proposal around the western Grand Canyon/Sanup area. The Hualapai did not view the proposal favorably and informed the agencies of their own plans to meet with the air tour operators in an attempt to reach a separate agreement. Those talks, however, apparently proved fruitless.

The divergence of comments received to this rule reflects the FAA's historical experience with this issue. There are polarized points of view on this topic. During the time that this debate has been ongoing, the various groups have not been able to reach any agreement. Thus, based on the FAA's and NPS' experiences with this issue, the agencies do not see that a timely negotiation process is possible. The FAA and NPS have expressed a willingness to consider negotiated or consensus proposals presented by the stakeholders and have encouraged the stakeholders to try to work toward this goal. However, in the absence of such proposals it is necessary to move ahead to meet the deadline of 2008 for substantial restoration of natural quiet and experience that was imposed by the President's 1996 Executive Memorandum. Any further attempts at negotiated rulemaking will only delay the process.

C. Justification for Rulemaking With Respect to Restoration of Natural Quiet (Pub. L. 100-91)

Air tour operators and many other commenters state that the restoration of natural quiet has already been achieved. These commenters state that there is significant evidence demonstrating that the flights as presently configured fall well within the NPS' target goal that 50% of the park achieve "natural quiet" for 75-100% of the day. Further regulations merely seek to punish the air tour industry. In a form letter, 313 commenters state that the statutory mandate of Public Law 100-91 has been met.

GCATC states that the FAA is charged with the responsibility of promoting and protecting aviation and the safe use of the nation's airspace and that the proposed rule is beyond the scope of this mandate.

The Honorable Mr. Jeff Groscost, Arizona Speaker of the House, stated at the Flagstaff, Arizona public hearing on August

17, 1999 that restricting operations to 1997-1998 levels is unwarranted. He indicated that visitor complaints about noise are at insignificantly low levels because the vast majority of park visitors (over 95%) are concentrated in areas that are off-limits to air tours. Speaker Groscost indicated that the FAA and NPS are off base in attempting to erase noise for the benefit of the remaining 5%. In fact, according to FAA and NPS numbers, Speaker Groscost states that 3% of this 5% are river rafters who could not possibly hear aircraft noise over the sound of the river. He comments that to "restore natural quiet" for the benefit of the 1.6% of park visitors, at the cost of limiting access by air, is grossly unfair and unreasonable. This is especially true in light of the fact that air tour passengers represent over six to eight times the number of backcountry users.

U.S. Senator Harry Reid (Nevada) stated that he voted for Public Law 100-91 and believes strongly in its goals. However, "* * * it was never the intention of Congress to authorize the apparently endless regulatory process that has ensued." Senator Reid stated further that "* * * the most fundamental problem is that the Park Service has based its plan for restoring natural quiet on a controversial and untested approach for measuring noise." The approach used needs to reflect the actual perception of visitors to the park as shown in surveys that show that visitors perceive a dramatic improvement in the noise levels of the park over the last 10 years.

The Grand Canyon River Guides Association and the Utah Chapter of the Public Lands Committee of the Sierra Club state that the number of flights must be reduced in order to meet the goal of substantial restoration of natural quiet. The continued growth alternative is unacceptable. These commenters note that the current annual growth, according to the data, is about three percent per year, despite claims by some air tour operators.

The Grand Canyon River Guides Association states that the goal set forth in the Environmental Assessment—i.e., tour aircraft audible for less than 25 percent of the day in more than half of the park area—is a weak standard. This commenter believes that this should be a minimum goal. The bottom line is that only 19 percent of the park is naturally quiet during the busiest days of the summer. The commenter states that the claims of a 42 percent restoration are based on an annualized day.

The Maricopa Audubon Society says that the FAA's standard of quiet is weak and the substantial restoration of natural quiet should mean most of the park most of the time (for example, 75% of the Park, 100% of the time). This commenter adds that the number of air tours has more than doubled from 50,000 in 1987 to around 120,000 now, and that the FAA should both reduce the cap the number of air tours to at least 1987 levels in order to achieve the natural quiet that the law mandates. Finally, this commenter adds that the FAA should require the removal of all flights below the rim.

The environmental coalition states that Public Law 100-91 provides no statutory authorization for the agencies' attempts to balance the maintenance of a "viable" air tour industry against the mandated restoration of natural quiet. Congress unequivocally provided the NPS' plan, to be issued by FAA, "* * * shall provide for substantial restoration of natural quiet". These commenters do not believe that Congress directed the agencies to temper, delay, or compromise the mandate according to industry needs. The agencies' only duty beyond restoring quiet was ensuring that the plan to restore quiet did not adversely affect air safety. These commenters urge the agencies to choose an alternative that will achieve the statutory mandate within 12 months. It is simply impermissible for the agencies to decide unilaterally to protect the industry, rather

than considering readily available alternatives that would immediately restore natural quiet.

The environmental coalition supports the definition of 'natural' used by NPS, however, it believes the definition of "substantial restoration" is flawed. It suggests that a more appropriate definition would require natural quiet throughout the day in 50 percent of the park, as a minimum and natural quiet for at least 80 percent of the day in the other half of the park.

The Utah Chapter of the Public Lands Committee of the Sierra Club noted at the Flagstaff Public Hearing that the derogation of North Rim vista points and trails during the short summer season is emblematic of runaway noise pollution in the canyon generally.

ARA says that the standard that 50% of Grand Canyon National Park must be naturally quiet 75 to 100% of the day is inadequate. This would mean that the relatively quiet half of the park could experience aircraft noise one minute in every four, and the remainder of the park could experience aircraft noise virtually all day long non-stop. ARA states that Congress intended for a visitor to the Grand Canyon to experience a substantial restoration of natural quiet regardless of which day(s) the visitor decides to visit the park. Each visitor should have the opportunity to experience natural quiet regardless of the day, the month, or the season he or she elects to visit.

FAA Response: Public Law 100-91 requires NPS to develop recommendations regarding "actions necessary for the protection of resources in the Grand Canyon from adverse impacts associated with aircraft overflights." These recommendations are to provide for the "substantial restoration of the natural quiet and experience of the park and protection of public health and safety from adverse effects associated with

aircraft overflight." Section 3 of the Public Law specifically directed the FAA to "implement the recommendations of the Secretary [of the Department of Interior] without change unless the [FAA] determines that implementing the recommendations would adversely affect aviation safety." Thus FAA's authority to regulate in this manner is clear.

The NPS defined "natural quiet" and identified it as a natural resource in its 1986 "Aircraft Management Plan Environmental Assessment for Grand Canyon National Park" which underwent extensive public review. The term was subsequently discussed in numerous public documents which have undergone public review, including NPS Management Policies (1988) and the Advance Notice of Proposed Rulemaking concerning Overflights of Units of the National Park System published in the Federal Register on March 17, 1994.

The fact that NPS was given the responsibility to define the methods for achieving substantial restoration of natural quiet is entirely consistent with its general authority to manage national parks. NPS' Management Policies (1988, page 1:3) states that, with respect to units of the national park system, the terms "resources and values" refer to the "full spectrum of tangible and intangible attributes for which parks have been established and are being managed" including "intangible qualities such as natural quiet."

The NPS definition of "substantial restoration of natural quiet" involves time, area, and acoustic components. Because many park visitors typically spend limited time in particular sound environments during specific park visits, the amount of aircraft noise present during those specific time periods can have great implications for the visitor's opportunity to experience natural quiet in those particular times and spaces. Visitors with longer exposures, such as backcountry and river users have more opportunity to experience a greater variety of

natural ambient and aircraft sound conditions, as they typically move through a number of sound environments.

Based on noise studies, the NPS has concluded that a visitor's opportunity to experience natural quiet during a visit, and the extent of noise impact depends upon a number of factors. These factors include: the number of flights; the sound levels of those aircraft as well as those of other sound sources in the natural environment; and the duration of audible aircraft sound experienced by a visitor.

NPS recommended an operations limitation in its 1994 Report to Congress, *See* Section 10, Recommendation 10.3.10.3. It is but one method being implemented to control noise in the GCNP. The type of operations limitation adopted in this rule is a modification of the aircraft cap which was adopted in the 1996 Final Rule. The FAA and NPS determined after adoption of the 1996 Final Rule that the aircraft cap did not adequately limit growth. This conclusion was explained in the reevaluation that was prepared to support the Notice of Clarification (discussed above in section III(A), Modification of SFAR 50-2, of this rule). The written reevaluation was necessary because the number of aircraft available for use in the GCNP SFRA was twice the number that was evaluated in the 1996 rule. The NPS noise modeling, as well as FAA noise modeling, indicated that the potential growth in the number of operations could erode gains made toward substantial restoration of natural quiet.

The FAA, in consultation with the NPS, believes that the operations limitation adopted in this final rule strikes an appropriate balance between the ground and air users of the GCNP while making significant steps towards substantially restoring natural quiet. Thus the rule is consistent with the intent of the Public Law. Nothing in Public Law 100-91 requires the FAA or NPS to ban aircraft overflights of the

GCNP to reach substantial restoration of natural quiet. In fact, Senator McCain, in discussing this legislation on the Senate floor indicated that "what this measure [the bill that was adopted as Public Law 100-91] does is propose a process whose end result will be to strike a balance among all those individuals and interests who use our Nation's Park System." 133 Cong. Rec. S 1592. In an Oversight Hearing on the implementation of Public Law 100-91, Senator McCain further indicated that "* * * it has never been my intent or the intent of Congress that air tours should be banned over the Grand Canyon or any other park. Air tours are a legitimate and important means of experiencing the Grand Canyon * * * But other uses and values, including the right of visitors to enjoy the natural quiet of the park, must be protected. Again, the challenge and the goal is balance." Hearing before the Subcommittee on Aviation of the Committee on Public Works and Transportation, House of Representatives, 103rd Cong., 2d Sess. (July 27, 1994).

As a general rule, flights do not operate below the rim. In certain isolated situations aircraft being operated on certain fixed routes and at fixed altitudes may operate below the ground level of the rim temporarily. This occurs because of terrain fluctuations. Safety is not compromised by allowing these flights to operate below the rim for a short period of time. This action is consistent with Pub. L. 100-9 and its legislative history. In Pub. L. 100-91, Congress granted the FAA, in consultation with the NPS, the authority to determine rim level because "delineation of the area needs to be made taking into account the varying rim levels of the canyon and the potential impact of this provision on flight activities and operations." S. Rep. 97 (100th Cong., 1st Sess. (1987)), reprinted in 1987 U.S. Code Cong. Admin. News 664.

D. Quiet Technology Incentives

Several commenters criticize the proposal for failure to offer any quite technology incentives. As an incentive to convert to quiet technology, Papillon proposes special routing similar to the flight route that presently exists at GCNP Airport, and allowing operating hours from 7:00 a.m. to 7:00 p.m. with no limitations on the amount of flight during those daylight hours. Grand Canyon Airlines suggests that allocations should be increased for operators who make use of quiet aircraft technology.

Grand Canyon River Guides Association stated at the Flagstaff Public Hearing that noise-efficient technology still makes noise. The environmental coalition notes that the incentive to convert should be access to the GCNP SFRA airspace.

Governor Hull states that the FAA and NPS have failed in their obligation to provide incentives for quiet technology aircraft. The Governor states that the federal government should provide expanded opportunity and access for all citizens to experience the GCNP. In the proposed rulemaking, however, the Governor notes that the FAA is proposing to limit access to the GCNP rather than pursuing a common sense approach to expand access through improved technology. Governor Hull notes that before proceeding with further limitations on the air tours that provide many citizens with their only access to the wonders of the Grand Canyon, the FAA and NPS should act aggressively to provide the incentives for quite technology. The Governor supports the view expressed by Senator McCain, who sponsored the original Act, that reasonable air tour access can be protected—along with the preservation of natural quiet—if the responsible federal agencies diligently pursue technological incentives.

Stemme USA, Inc., a manufacturer of gliders, requests that the FAA exclude the Stemme S10, as well as other aircraft that can operate silently, from all current and future flight restrictions over the Grand Canyon. Twin Otter International, Ltd. (TOIL) also requests that its aircraft be considered as satisfying the quiet technology standards. Air tour operators also made suggestions regarding the types of aircraft that should be considered as being within the framework of quiet technology. Papillon Helicopters provided information at the public hearing in Flagstaff, Arizona that based on assurances that the NPS would make exceptions for quiet aircraft, Papillon has invested over $ 6.5 million in quiet aircraft technology. A Papillon representative stated that no exceptions have yet been made and no laws have been passed that justify this investment. Grand Canyon Airlines stated that it, along with several other companies, contributed $ 50,000 to the NPS to allow them to finish research on quiet technology. Grand Canyon Airlines paid $ 1.4 million for each of their "Vistaliner" aircraft that employ quiet technology and that are noise efficient because they can carry more passengers on fewer flights.

Grand Canyon Airlines states that the higher fixed costs associated with investments in quieter aircraft make it more likely that Grand Canyon Airlines and other similarly situated operators will suffer disproportionately from the limitations on air tour operations. Not only does the NPRM not encourage investment in quiet aircraft but Grand Canyon Airlines states it also creates an incentive for operators to dump more expensive quiet technology aircraft for cheaper, noisier aircraft.

Grand Canyon Airlines also states that allocations should not be imposed, particularly for quiet aircraft, but if imposed they should be guaranteed not to decrease. Allocations should increase for operators investing in quiet technology. AirStar Helicopters urges the FAA to move quiet aircraft technology to the front burner, not wait and consider it in the future.

Comments received from members of the Arizona State Legislature state that the proposal, combined with the Park Service's newly adopted noise evaluation methodology, creates such uncertainty for the air tour industry that they have little incentive to invest in one of the most effective means of reducing aircraft sound-quiet technology. Without a sense of stability about the future, operators are reluctant to invest in costly new equipment. Faced with caps and curfews, they are understandably concerned about their ability to amortize the investments. Their lenders are equally concerned about the industry's future, adding another dimension of uncertainty for operations.

ARA says that the incentives for quieter aircraft should not further compromise the goal. Rather than allowing quieter aircraft more routes, quieter aircraft should be used to meet the existing substantial restoration goal.

FAA Response: The FAA and NPS note that current comments are a complete reversal in direction from comments to the NPRM on Noise Limitation of Aircraft Operations in the Vicinity of Grand Canyon National Park (Docket 28770). Many air tour operators commenting to the NPRM in Docket 28770 voiced wide dissatisfaction with the FAA's NPRM on quiet technology. Commenters to that docket stated, among other things, that the FAA did not have statutory authority to require quiet technology, and that imposition of quiet technology would pose an unreasonable financial burden on the air tour industry. Additionally, many of these commenters disagreed with the proposed aircraft categories. In contrast, in Docket FAA-99-5927, commenters supported the adoption of quiet technology and urged the FAA to move forward with the final rule in Docket 28770.

The FAA and NPS have been in ongoing discussions to resolve the numerous issues raised in the Noise Limitations

rulemaking proceeding. During this time, growth in the air tour industry appears to have been only temporarily arrested by external factors such as the economic downturn in Asia. Thus, the agencies have determined that in order to make significant strides towards meeting the statutory goal of "substantial restoration of the natural quiet" by the 2008 deadline it is necessary to impose this operations limitation. This operations limitation will limit operations while the FAA and NPS work to implement the quiet technology rule and take any other steps necessary to effect the Comprehensive Noise Management Plan.

The FAA received a number of requests from air tour operators and aircraft manufacturers for exceptions to the operations limitations rule based on the type of aircraft used in the GCNP. The FAA declines to adopt any exceptions to this rule at this time. Until the FAA and NPS adopt a final rule defining quiet technology, requests for exceptions to this rule based on quiet technology are premature.

The FAA realizes that this rule may not be consistent with encouraging operators to invest in quiet aircraft. However, since the FAA and NPS have not yet resolved how to define quiet technology/noise efficiency, operators would be premature in making such equipment decisions. Since the FAA intends this operations limitation to be temporary, the continuation of any such limitation will be revisited upon adoption of a rule addressing quiet technology/noise efficiency. The comment suggesting an allocation increase for operators investing in quiet technology is also premature since there is no definition of quiet technology.

E. Delay of Rulemaking

The Arizona Corporation Commission expresses concern over the lack of input from Arizona government officials into the proposed rules. Since the GCNP is Arizona's premier

tourist destination and an extremely significant component of Arizona's tourism industry, the FAA should be working with Arizona government officials in developing any rules affecting air tours in the Grand Canyon. This commenter notes that the Rocky Mountain National Park air tour ban was largely prompted by the urgings of Colorado public officials to preemptively ban air touring before it emerged.

A number of air tour operators requested that the FAA delay adoption of the final rule until the noise model validation study has been completed. Papillon says that there should be no allocations until there is a reasonable scientific evaluation of ambient sound levels. This evaluation, according to Papillon should establish what the ambient sound levels are at the sites in question in the Grand Canyon.

FAA Response: The FAA appreciates the input from state and local officials to the proposed rules. The rulemaking process has welcomed and encouraged participation by state and local government officials. The decision to proceed with substantial restoration of natural quiet at the GCNP was made by Congress in Public Law 100-91. Moreover, as discussed above in Section C, that legislation specified the process for moving forward with substantial restoration of natural quiet. This is the process that the FAA and NPS have adhered to in developing these proposed rules.

In response to the requests to delay this rule pending completion of the noise model validation study, the FAA declines to create further delay. The noise methodologies used in support of this rule are explained further in the Supplemental Environmental Assessment Chapter 4 and Appendices A through F. The noise modeling employed in the Supplemental Environmental Assessment is the Integrated Noise Model (INM), the FAA's standard computer methodology for assessing and predicting aircraft noise impacts. This model

incorporates the ambient database supplied by the NPS. Since 1978, the INM has been widely used by the aviation community both nationally and internationally, and has been continuously refined and updated by the FAA. For these reasons, the FAA has determined that a modified version of the INM 5 is an appropriate tool to use for the purposes of analyzing noise impacts in the vicinity of the GCNP and for determining substantial restoration of natural quiet in the GCNP.

F. Impact on Native American Tribes

Hualapai Nation

Grand Canyon Resort Corporation (GCRC), representing the economic interests of the Hualapai Nation (hereinafter Hualapai Tribe), opposed the operations limitations. It states that a freeze on overflights will effectively cost the Hualapai Tribe millions of dollars in lost revenue. Air tour operators rely on the marketability of an approach to Grand Canyon West (GCW) through the Grand Canyon as it presently operates. With the imposition of overflight restrictions, GCRC states that the Hualapai Tribe would sustain a combined loss of approximately $ 3.5 million dollars over the next two years. In comparison to the Hualapai government's annual operating budget of $ 2.5 million, this is tantamount to shutting down a sovereign tribal nation. In a recent survey to GCRC's primary air tour operators, it was determined that a 220% increase in business is projected by 2001. In 1998, approximately 14,919 flights were conducted at a profit to the Tribe of approximately $ 950,000. GCRC projects that by 2001, 32,869 flights will be conducted at a profit of $ 2,799,777. For a Tribe which is attempting to develop its economic resources without the intrusion of casino gambling at the south rim, development of GCW is worthy of federal support rather than federal suppression. GCRC requests that any operations limitation

within the SFAR avoid negatively impacting the Native American constituency.

GCRC notes that in addition to the potential loss of landing fees which would occur if the operations limitation were imposed, there would be a loss of potential revenue associated with tourist amenities offered at GCW which are dependent on the discretionary spending of visitors. Sales from gift shops, Hualapai arts and crafts, horseback riding excursions, hiking trails, food items and cultural presentations would suffer. GCRC currently employs 35 full-time Hualapai employees and another 20 seasonal full-time employees. This does not account for 15 Hualapai tribal members employed by air tour operators.

The GCRC and the Hualapai Tribal Counsel both indicate that the proposed operations limitation would have an immediate negative effect upon the number of Hualapai who derive their livelihood from tourism at GCW. Thus they request an exemption for the Hualapai Nation to ensure the continued employment of Hualapai community members whose reservation suffers from a 50-65% unemployment rate.

The GCRC is currently considering measures which would safeguard development at GCW. Environmental threshold studies are in progress, which will review the development capacity of GCW. It should remain, however, in the Tribe's control to determine the quality and quantity of development at GCW. In this regard, GCRC notes that the proposed rulemaking is a subtle violation of the Hualapai Tribe's sovereign right towards self-determination.

Additionally, the GCRC states that the FAA's proposed rulemaking would contradict the initiatives taken by federal agencies, which have funded capital improvements and developments at GCW over the last decade. Approximately

$ 5,000,000 has been expended in the development of GCW in an attempt to follow through with the DOI's commitment to protect and conserve the trust resources of federally recognized Indian tribes and tribal members. The Bureau of Indian Affairs participated in a guaranteed loan to the Tribe for tourist facilities at GCW totaling $ 1.3 million. The Environmental Protection Agency has expended approximately $ 1.5 million in solar powered water line construction to GCW. The United States Department of Agriculture has expended approximately $ 150,000 in water tank construction. In addition to this, the Hualapai Tribe has invested $ 250.000 in an award-winning land use plan GCW, $ 1 million in airstrip and road pavements, $ 150,000 in well drilling procedures, $ 565,000 in the construction of a terminal building and parking lots, and $ 25,000 in helicopter landing pads and fuel tank arrangements. This does not include the salaries of Hualapai employees who have dedicated years of planning to the development of GCW.

Havasupai Tribe

The Havasupai Tribe believes that the proposed action to limit commercial tours in the SFRA is not stringent enough and that all commercial fixed-wing tour flights should be removed from the Havasupai Reservation.

Navajo Nation

The Navajo Nation has expressed its satisfaction with the proposed rules during discussions pursuant to consultations conducted in accordance with the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA).

FAA Response: The FAA has consulted with the Native American interests throughout this rulemaking process. Consultations with the ten Native American Tribes and/or

Nations potentially impacted by the proposed rules have been conducted in accordance with NEPA and NHPA, Section 106. Currently, such consultations have concluded for all potentially impacted Native American Communities except the Hualapai Tribe. During the comment process it was brought to the FAA's attention that the Hualapai Tribe had a substantial economic interest in air tour business brought to its reservation via air tour operators operating under FAA Form 7711-1, Certificates of Waiver or Authorization, to deviate from the Green 4 helicopter route and Blue 2 fixed wing route and land on the Haulapai Reservation.

The FAA and NPS recognize that as federal agencies they owe a general trust responsibility to Native American Tribes or Nations, including the Haulapai Tribe. Pursuant to this unique trust responsibility, the FAA and NPS are essentially acting in the interest of the Tribe, however, they do so in the context of other federal statutes and implementing regulations. Of particular concern when considering fulfillment of the federal trust responsibility is the economic development and self-sufficiency of the Native American Tribe or Nation.

Based upon information provided by the Hualapai Tribe, approximately 45% of the Hualapai Tribe's global fund budget is derived from air tour operations at GCW. This income includes air tour operator contracts and landing fees, and the tourist dollars brought to the Hualapai Reservation by air tours. The income from the air tour operations is used to support youth activities and other social programs on the Reservation. In addition, air tour operators employ members of the Hualapai Tribe.

The economic analysis in the regulatory evaluation indicates that this rulemaking would significantly adversely impact the Hualapai Tribe's economic development and self-sufficiency, thereby triggering the FAA's and NPS' trust

responsibilities. While the air tour numbers derived from the operators' reported data are not identical to the numbers provided by GCRC, the FAA, using its numbers, still finds the impact of the operations limitation to be significantly adverse. The FAA believes that the numbers provided by GCRC in its comments include flights occurring outside the SFRA. In order to fulfill this trust responsibility, the FAA and NPS are excepting flights from the commercial air tour allocations requirement when those flights meet the following conditions: (1) transit the SFRA along the Blue 2 or Green 4; (2) operate under a written contract with the Hualapai Tribe; and (3) have an operations specification authorizing such flights. This exception is discussed in detail in Section H (7).

G. Discrimination Against Air Visitors

Several commenters believe the proposal suggests an intentional discrimination against the rights of air tour visitors to GCNP as compared to ground visitors. Several general aviation commenters have also suggested that the proposal is discriminatory against GA aircraft in favor of air tour aircraft.

One commenter states that the air tour visitors are not being discriminated against but rather they are being asked to abide by the same type visitation limitations that are imposed on other park visitors.

HAI says that visitation of the Grand Canyon by air is uniquely ecologically friendly because air tour visitors start no fires, leave behind no waste or trash, disturb no plants or soil, introduce no alien species, and remove or deface no artifacts. HAI says that efforts to further restrict air touring of GCNP are fundamentally misguided from an environmental perspective and that the current proposed restrictions will be destructive of the environment and the economy, have no basis in fact, and should be withdrawn.

The Cottonwood Chamber of Commerce (Arizona) says that 95% of park visitors are unaffected by aircraft sound, and that devastation of the air tour industry will result in the loss of aerial viewing opportunities for the elderly, handicapped and those with tight time schedules. The commenter says that many persons choose air tours due to physical or health limitations.

Las Vegas Helicopters states that the proposed rule will stifle access to the Grand Canyon by people who are handicapped, impaired or elderly and goes against the policies established by Congress when it adopted the Americans with Disabilities Act.

FAA Response: It is not the intent of the FAA or NPS to discriminate against visitors (air or ground) to the GCNP nor do the agencies believe this rule discriminates against air tour visitors. Indeed, air tour visitors are in many ways inseparable from ground visitors as over 50% of the air tour visitors to GCNP also visit the Park on the ground. Also, people who are handicapped, impaired, or elderly will continue to enjoy air tour access to the GCNP.

As discussed above in Section C, Congress' intent in adopting this legislation was to manage the airspace in the GCNP and to balance the competing interests. The FAA and NPS believe that the rule adopted today, together with the Final Rule in Docket FAA-99-5926, modifying the airspace and the adoption of the new route structure through the SFRA achieve that balance.

One standard method used by the NPS and other land management agencies to protect resources is to limit access to, or use of, certain resources. To protect the ground resources at GCNP, overnight camping in the backcountry and river rafting, for example, are limited through a permit process. Similarly, a number of services offered by park concessionaires, e.g.,

lodging, mule rides, etc., have limited availability. At GCNP, only entrance to the Park and dayhiking are available to unlimited numbers of visitors. Air tour visitors are presently the only "specialized" park visitors (i.e., river rafters, backcountry campers, mule riders, lodgers, etc.) that are not limited by number.

The agencies do not agree that this rule is misguided from an environmental perspective. While air tour visitors do not have the same type of environmental impact as ground visitors, they do have an environmental impact due to aircraft noise. That impact was recognized by Congress and is the reason for the adoption of Public Law 100-91.

H. Section by Section Review

1. Definitions Section 93.303

This section proposed new terms and definitions for commercial air tour and commercial Special Flight Rules Area Operation.

Several commenters opposed the proposed definition for "commercial air tour" because they believe it is too broad. Clark County states that the greatest long-term threats posed by the proposed rulemakings are the ominous precedents they would create for all facets of commercial aviation in the West, especially non-tour operations. Clark County is concerned because the rule leaves open the possibility that commercial transit flights between Las Vegas and Tusayan may be regulated in the same fashion as "air tours." The risk that restrictions on non-tour flights will be imposed is heightened by the vague guidance in the proposed rules regarding what constitutes an "air tour" instead of a transit flight. Clark County believes that the list of factors FAA says it will consider leaves too much discretion in FAA's hands and allows no certainty for tour

operators. Many of the factors identified (e.g., "narratives" referring to areas on the surface, frequency of flights, and area of operations) could apply to all commercial air carrier service operating along established jet routes east of Las Vegas. The danger is even more acute for regional and charter services in the area.

Clark County believes that the threat posed by this precedent extends to commercial aviation beyond the Grand Canyon air tour operators. Almost every commercial flight into and out of Clark County's airports passes over a National Park or Wilderness Area at some point in their route. The suggestion that point-to-point transportation could be the subject of restrictions due to unsubstantiated "natural quiet" concerns creates a specter of significant restrictions on aviation in Nevada and elsewhere in the West. It also constitutes an unreasonable, unprincipled and illegal transfer of airspace jurisdiction from FAA to NPS and other federal land managers.

FAA Response: The FAA is adopting the proposed definitions with modification. The definition for commercial air tour is intentionally broad. This definition requires the operator and the FAA to look at the actual flight and the nature of the operator's business to determine whether a flight is considered a commercial air tour. Simply because a flight may have one or two of the characteristics identified in the definition does not necessarily mean it is a commercial air tour. Clearly the more factors that apply to a particular flight, the more likely that flight will be found to be a commercial air tour. The Administrator may give more weight to some factors than others in making a determination under this definition.

This definition is necessary because currently there is no definition for the term "commercial sightseeing operation," which is the term used in part 93, subpart U.

The FAA appreciates the comments voiced by air tour operators regarding the new definition for commercial SFRA operations. The commenters are concerned because the FAA will begin to collect data on all transportation flights and other flights conducted by commercial air tour operators in addition to commercial air tour flights. The FAA also will require reporting for flights conducted under FAA Form 7711-1. The adoption of this definition is necessary, however, so that the FAA and NPS can begin to understand the aircraft patterns in the SFRA. Public Law 100-91 states that noise associated with aircraft overflights at GCNP is causing "a significant adverse effect on the natural quiet and experience of the park." Thus, the FAA hopes that by creating a broad term capturing many types of flights, and requiring reporting of those flights, it can develop a database that more accurately reflects aircraft noise in the park. The term Commercial SFRA Operations by definition only applies to an operator who holds GCNP SFRA operations specifications. This rule is focused on air tour operations, including flights in support of air tours, because the agencies have determined that other types of operations within the SFRA contribute minimal noise overall.

The definition of Commercial SFRA Operation is modified to eliminate the term "air tour" from the operations specification reference. This recognizes the fact that the FSDO may issue other types of operations specifications due to changes in market dynamics. The term commercial SFRA operations is broader than the term commercial air tour and includes not only air tours, but also transportation, repositioning, maintenance, training/proving flights and Grand Canyon West flights. Grand Canyon West covers flights conducted under the section 93.319(f) exception. All of these flights will be defined in the "Las Vegas Flights Standards District Office Grand Canyon National Park Special Flight Rules Area Procedures Manual." The term "commercial SFRA operations" does not include supply and administrative flights

conducted under contract with the Native Americans pursuant to an FAA Form 7711-1 or any other flights conducted under an FAA Form 7711-1.

2. Flight Free Zones and Flight Corridors Section 93.305

The proposed changes to this section incorporate the definitions set forth in section 93.303 by changing the term "commercial sightseeing operation" to "commercial air tour". While there were several comments on section 93.303 regarding the definition of commercial air tour, there were no comments specific to section 93.305. The changes to this section are adopted as proposed and are reflected in the final rule addressing the airspace modifications, Docket No. FAA-99-5926.

3. Minimum Flight Attitudes section 93.307

The proposed changes to this section incorporate the definitions set forth in section 93.303 by changing the term "commercial sightseeing operation" to "commercial air tour". While there were several comments on section 93.303 regarding the definition of commercial air tour, there were no comments specific to section 93.307. The changes to this section are adopted as proposed and are reflected in the final rule addressing the airspace modifications, Docket No. FAA-99-5926.

4. Requirements for Commercial Special Flight Rules Area Operations, Section 93.315

No comments were received specific to this section, thus this section is adopted as proposed. Pursuant to these amendments, section 93.315 is reorganized and revised to remove the capacity limitation on aircraft and to delete the reference to the outdated SFAR 38-2. The FAA believes that

removal of the capacity restriction is necessary because it is aware that some air tour operators are using larger capacity aircraft. The FAA wants to ensure that each operator, regardless of the capacity of the aircraft, is held to the same operational and safety standards. This section will continue to require commercial SFRA operators to be certificated under 14 CFR part 119 to operate in accordance with either 14 CFR part 121 or part 135 and to hold appropriate GCNP SFRA operations specifications.

5. Section 93.316

Section 93.316 is removed and reserved as proposed.

6. Curfew Section 93.317

The proposed rule modified section 93.317 slightly to apply the curfew to all commercial SFRA operations. The curfew set forth in current part 93 applies to "commercial sightseeing operations," which is an undefined term.

Some commenters state that the change in the curfew is too broad and captures too many types of flights that are not air tours. GCATC believes the curfew should be eliminated in lieu of the operations limitations cap. Air tour operators contend that the curfews have caused significant loss to operators located at GCNP Airport and air tours should be permitted from 7 a.m. to 7 p.m.

Sunrise Airlines states that the most effective way of restoring natural quite in the GCNP is to remove air tour noise. This penalty against the air tour operators is already in place in the form of curfews for the Dragon and Zuni Point corridors. Using a summer day of 14 hours from sunrise to sunset of which 4 hours is during the curfew, the result is more than 28% of the day has no air tour noise. Sunrise believes consideration

also must be given for the many days during the slow months of the winter season when the GCNP attains the goal of "Substantial Restoration of Natural Quiet". Sunrise suggests the possibility of imposing a curfew on the current Blue One route, and believes that would restore natural quiet in much the GCNP without the need to either limit growth (allocations) or further limit the airspace available for air tours (routes).

Grand Canyon River Guides Association states that the curfews are not long enough and should be expanded to narrow the window for air tour operations.

The environmental coalition believes that the existing curfew should be applied to all commercial SFRA flights and should be expanded to provide significantly more quiet time after sunrise and before sunset.

FAA Response: The amendment to this section is adopted as proposed. The definition for commercial SFRA operations includes all commercial operations conducted by certificate holders authorized to conduct flights within the GCNP SFRA. Specifically, the types of flights included within the curfew are commercial air tours, training/proving, maintenance, transportation, and repositioning flights. Only flights conducted under FAA Form 7711-1 are not subject to this curfew. This exclusion is necessary because the limitations applicable to these flights are already specifically defined on the FAA Form 7711-1. In some instances, it may be necessary to issue an FAA Form 7711-1 for the Dragon or Zuni Point corridor for flights that may not be subject to the curfew, e.g., NPS or other public aircraft flights. The FAA believes that amending the curfew to include all commercial SFRA operations will improve the management of aircraft noise in the Dragon and Zuni Point corridors.

While a number of commenters requested changes to the curfew hours, or an extension of the curfew to other areas, these issues were not proposed in the NPRM and thus are outside the scope of the proposed rule.

The agencies believe that the curfew is still required on the Dragon and Zuni Point corridors even with the adoption of the operations limitation. The operations limitation will not affect the timing of flights. The FAA and NPS believe that it is important to protect natural quiet during curfew hours in the most heavily visited portions of the eastern portion of the GCNP. The NPS has identified these areas as some of the most sensitive in the park. For computational purposes the NPS has established the 12-hour period between 7 AM and 7 PM, rather than the period from sun-up to sunset, as the "day" in the definition of substantial restoration. The fixed curfew that was established in the 1996 final rule makes an important contribution to substantially restoring natural quiet on a daily basis and mitigating noise impacts on the experience of the park visitors in this portion of the Canyon.

7. Operations Limitation Section 93.319

Section 93.319 of the proposed rule sets forth the requirement that an air tour operator must have an allocation to conduct commercial air tours in the GCNP SFRA. The NPRM set forth the following parameters regarding the initial allocation process: (1) Initial allocations would be based on the total number of commercial air tours conducted and reported by the certificate holder to the FAA for the period May 1, 1997 through April 30, 1998; (2) allocations would be apportioned between peak and non-peak season and between Dragon and Zuni Point corridors and the rest of the GCNP SFRA; and (3) an operator's allocation will be reflected in its GCNP SFRA operations specification.

Initial Allocations. Grand Canyon River Guides Association supports capping operations at the level reported by operators for May 1, 1997 through April 30, 1998. However, this commenter adds that there are many more flights that should be counted against allocations such as aircraft-repositioning flights, training flights, and transportation flights.

Many air tour industry commenters state that the initial allocations do not reflect the business operations as of the date of Notice 99-12. All air tour industry commenters state that the 1997-1998 base year used for establishing the allocations was an unusually slow year and does not reflect the typical year for Grand Canyon air tour operations.

NATA stated that the base year for determining allocations (May 1, 1997 through April 30, 1998) was one of the worst years ever. This commenter contends that it is inappropriate for the FAA to base the future number of tours on any single year and that an average of operations over a multiple-year period would provide more reasonable figures.

Similarly, Papillon Grand Canyon states that May 1, 1997 through April 30, 1998, is not an appropriate year for establishing allocations. Governor Hull also believes that the FAA is using an abnormal, low operation year as a baseline in establishing the allocations for air tours.

Windrock Aviation states that, while there is a provision within the NPRM for certificate holders to request modification of the allocation, the NPRM states specifically that the FAA will not consider increasing an initial allocation because of changes in consumer demand or the fact that the base year was not a busy year, operationally. This commenter says that this would result in the revocation of their certificate and put them out of business. Windrock recommends that, in their case,

another year be utilized as the base year without reducing that number of flights from the total number of flights allocated from the remaining air tour operators.

The environmental coalition states that allocations must include all commercial SFRA flights, including river takeouts, FAA Form 7711-1 flights, so-called 'transportation' and 'repositioning' flights, and training flights. Flights that are not truly tour flights should be strictly routed to avoid the SFRA. To a visitor on the ground, each pass is a noise event.

AirStar Helicopters believes that the allocation process is predicated on a flawed and non-factual process and therefore should not exist.

Heli USA states that it should not be subject to any allocations or other limitations because it operates under special authorization granted on FAA Form 7711-1. The commenter says that its operations are in support of the Hualapai Nation, and that its flights are not considered commercial air tours. Heli USA recommends that the FAA clarify that all flights under FAA Form 7711-1 be excepted from the definition of "commercial air tours."

A number of air tour operators requested increases in their allocations for specific reasons, in addition to the generic concerns raised above about the representation of the base year. Reasons for these requests can generally be categorized into six main areas: (1) Allocations should be adjusted due to significant aircraft down time during the base year; (2) allocations should be adjusted to incorporate operations that were not reported because they were not conducted in the SFRA but, with the airspace modifications implemented on January 31, 2000, next year will be within the GCNP SFRA; (3) allocations should be adjusted for flights servicing the Grand Canyon West Airport on the Hualapai Reservation; (4)

allocations should be adjusted for operators just starting up in the base year; (5) allocations should be adjusted due to FAA error; and (6) allocations should be adjusted where certificate holders merged or acquired the assets of another operator.

FAA Response: The FAA is adopting the operations limitation with modifications discussed below. The FAA and NPS recognize that the operations limitation will limit the ability of the operators to increase the number of commercial air tours in the GCNP SFRA and limit revenue. The FAA and NPS are sensitive to the fact that this limitation may have a trickle down effect with regard to other businesses dependent upon air tour passengers and to the tourism industry generally located in Las Vegas, Nevada and Arizona. However, the NPS recommended in its report to Congress that this operations limitation is necessary in order to control the aircraft noise in the GCNP SFRA and make progress towards reaching the goal of substantial restoration of natural quiet.

Data on operations levels for the year May 1, 1997 through April 30, 1998 comprised the most accurate and current data available during the period that this rule was being drafted. Data subsequently collected from the industry for the year May 1, 1998 through April 30, 1999 show a slight decline in the number of total operations from the previous year. Thus the FAA and NPS believe that the period from May 1, 1997 through April 30, 1998 is a representative year for the purpose of imposing this allocation.

The FAA, in consultation with NPS, seeks to find a balance between the environmental interests of ground visitors and the interests of the air tour industry that will help the agencies manage the GCNP airspace to further achieve substantial restoration of the natural quiet. Thus, to ensure that the allocations process is fair, the FAA has established broad parameters to apply to the various types of allocations issues

presented by the operators. Therefore, while the base year remains the same for the implementation of this rule, the FAA has adjusted the air tour allocations in accordance with the following parameters:

First, air tour operators who presented credible documentation indicating significant aircraft down time due to maintenance problems will receive adjusted allocations. The FAA determined that it would not be in the best interest of safety to penalize an operator who had experienced maintenance problems and removed that aircraft from operation to assure safe operations and therefore did not have that aircraft in operation for much of the base year.

Second, air tour operators who presented documentation that they conducted flights that were not reportable during the base year because they were outside the GCNP SFRA, but would be included in the GCNP SFRA in the future, will not be limited at this time. This exception is adopted at § 93.319(g). The FAA is unable to impose a fair limitation since there was no requirement to report these flights. Upon implementation of this rule, certificate holders will be required to report these commercial SFRA operation. At the conclusion of the first year of reporting, the FAA plans to impose an operational limitation equal to the number of commercial air tours reported for the 12-month period. Additionally, the FAA plans to issue a notice of proposed rulemaking to amend section 93.309(g)

Third, the FAA and NPS have decided to except operators complying with specific conditions from the individual allocation process. This is necessary in order to fulfill the government's trust responsibility to the Hualapai Tribe. As detailed in the regulatory evaluation accompanying this rule, the Hualapai Tribe would be significantly adversely impacted from an economic perspective if the operations limitation were

applied to operators servicing Grand Canyon West Airport in support of the Hualapai Tribe. These conditions are as follows:

(1) The certificate holder conducts its operation in conformance with the route and airspace authorizations as specified in its GCNP SFRA operations specifications;

(2) The certificate holder must have executed a written contract with the Hualapai Indian Nation which grants the certificate holder a trespass permit and specifies the maximum number of flights to be permitted to land at Grand Canyon West airport and at other sites located in the vicinity of that airport and operates in compliance with that contract; and

(3) The certificate holder must have a valid operations specification that authorizes the certificate holder to conduct the operations specified in the contract with the Hualapai Indian Nation and specifically approves the number of operations that may transit the Grand Canyon National Park Special Flight Rules Area under this exception.

Fourth, the FAA is not adjusting allocations for one operator who stated that he was a start-up business. The FAA notes that this operator was issued operations specifications for GCNP on October 21, 1996. The FAA is not considering growth as a factor in its reassessment.

Fifth, the FAA is adjusting some air tour operators' allocations where the operators presented documentable evidence that there was an error in the FAA calculation.

Sixth, the FAA is adjusting some air tour operators' allocations where they have presented documentable evidence of a contractual transaction such as a merger or acquisition. These adjustments were based on the contracts negotiated

between the parties and attempt to reflect the agreements negotiated between those parties.

The FAA is not limiting any other types of flights other than commercial air tours. The FAA considers a commercial air tour to be synonymous with the term commercial sightseeing flight as that term is used in part 93, subpart U. Since operators were only required to report commercial sightseeing flights under current § 93.317, the FAA had no regulatory basis for limiting any other type of flight. The FAA also disagrees with some commenters who suggest that non-tour flights should be routed to avoid the SFRA. The SFRA was designed to ensure the use of standardized routes, altitudes, and flight reporting procedures to improve safety. This standardization has significantly decreased accidents and incidents in the GCNP SFRA.

Peak Season Apportionment. Most air tour industry commenters are opposed to the separation of allocations between peak and off-peak season. Some state that there would be no incentive on the part of operators to move off-peak season allocations to peak season and that this separation would be an unnecessary burden.

Papillon indicates that if allocations do become regulation, there should be no restrictions with regard to what season they can be utilized. Park visitation dictates the number of flights that will be conducted in a given season. If allocations are on an annual basis flight usage will follow the historical past.

Papillon also states that the concern that air tour operators may shut down during off-peak season to move off-season allocations into peak-season is not valid. There would be no incentive to move off-season flights to peak-season. This highly technical business requires continuity of personnel, extensive and recurrent training, off-season maintenance, etc.

The locale of operation is home for the employees of these aviation businesses and they must sustain their families on a year-round basis. Papillon indicates that the existing limitation on the number of aircraft is more equitable than a limit to the number of tours.

Sunrise Airlines states that a five-month peak season (May-Sept) would be acceptable for purposes of assigning allocations.

Air Vegas also finds no reason to control peak/off-peak season as the marketplace already does this. They are in agreement with May-September being on average busier months but argue that depending on promotional travel campaigns, other months such as March or October have the potential of equal or more enplanements.

Air Grand Canyon and Windrock Aviation propose that, due to the uncertainty of both the weather and tourism, generally, a five month period be utilized to distinguish "peak" and "non-peak" seasons. As a caveat to the issue of seasonal caps, the commenters recommend that each operator be allowed to shift ten (10) percent of his "non-peak" allocation to the first and last month of the peak season in the event the operator should determine that doing so would better utilize his allocation. Air Grand Canyon and Windrock say that this would allow the operator to compensate for whether problems and tourism volume fluctuations. These commenters believe it also would allow the operator to utilize allocations that might otherwise be lost during a substantial and protracted winter period. Finally, these commenters state that implementation of the recommendation would keep the "non-peak" allocation from being used during the busiest peak months, thereby avoiding the air corridor "congestion" issues that the NPRM anticipates would occur in the event that the operator was

allowed to shift all of his allocation to the busiest summer months.

The environmental coalition recommends a seasonal cap to prevent the movement of allocations from one season into another. A peak-season term of May 1 to September 15 is proposed. Certain areas of the park are completely unusable to visitors that seek natural quiet. This coalition recommends that a 24 hour per day tour free season be established for at least the eastern half of the SFRA from September 15-December 15 (this period being prior to the snow season). Additionally, it recommends a daily reservation limit as is applied to other park activities. Such a limit would control the maximum daily number of air operations per route.

ARA is also concerned about allocations shifting into low noise time periods and lesser-used flight routes. This commenter favors the caps becoming far more specific, such that low use periods and areas of the Canyon don't "fill in" given the inadequacy of the restoration standard.

FAA Response: The FAA is not adopting the peak season apportionment for allocations at this time. The FAA is adopting the Dragon and Zuni Point corridor apportionment. The FAA has a number of statutory obligations that apply in this rulemaking in addition to the statutory mandate set forth in Public Law 100-91. These obligations include compliance with the Small Business Regulatory Evaluation and Flexibility Act (SBREFA). SBREFA requires the FAA to consider the impact of FAA regulations on small businesses and to mitigate adverse impacts if possible. In an effort to strike a balance and fulfill the FAA's statutory obligations under Public Law 100-91 and SBREFA, the FAA is not apportioning the allocations between peak and off-speak season. By eliminating this additional allocation restriction, the operators will have some flexibility in

their business operations so that they can mitigate revenue losses that this operations limitation may cause them.

The FAA and NPS, however, are still concerned about the level of noise in the GCNP, especially during the peak summer season. Since the goal of this rule is to limit operations to control noise, any significant increases in noise during the summer season when noise in the GCNP is the highest would frustrate that goal. Thus, the NPS will be closely monitoring the noise levels in the GCNP over the next two years to determine whether the noise level in the park is increasing, remaining constant or decreasing. If the NPS determines that the noise levels in the GCNP are increasing during the summer season, it may be necessary to adopt a peak season apportionment of allocations in two years.

The FAA also will closely monitor the level of air tour traffic through the GCNP SFRA to ensure that safety is not compromised by air tour operators concentrating their allocations during the summer time period. If congestion becomes a significant problem during certain time periods such that safety is compromised, the FAA may need to take action to mitigate the problem. As noted in the NPRM, the FAA's Airport and Airspace Simulation Computer Model (SIMMOD) demonstrated significant use of the routes during the peak season. At this time, based on the information obtained from the operators regarding their current operations, and the specific provisions that are being adopted for operators servicing the Hualapai Indian Reservation at Grand Canyon West airport, the FAA believes that it is not necessary to impose the peak season apportionment from a safety perspective.

While some operators oppose having any restrictions on allocations at all, the FAA and NPS have determined that it is necessary to apportion allocations between the Dragon and Zuni Point corridors and the rest of the GCNP SFRA. This

apportionment is necessary because the noise in the Dragon and Zuni Point corridors is higher than elsewhere in the SFRA. For instance, the FAA regulatory evaluation accompanying this rule notes that fixed wing aircraft and helicopters that feature or include the Dragon corridor account for just over 45% of all air tours during the base year. Zuni Point tours account for just over 19% of all air tours. By apportioning allocations, the noise in the Dragon and Zuni Point corridors should not increase overall. Additionally, this restriction will help to maintain the number of air tours in these corridors at a manageable level.

The FAA is not adopting the suggestions that a tour free season be imposed on the eastern half of the SFRA or that a daily reservation limit be imposed on the air tour operators. Neither of these suggestions were considered in the proposed rule, thus they are outside the scope of this rulemaking.

8. Transfer and Termination of Allocations
Section 93.321

This section, as proposed in the NPRM, established that allocations are an operating privilege, not a property right. It also sets forth certain conditions applicable to allocations, namely: (1) Allocations will be reauthorized and redistributed no earlier than two years from the date of this rule; (2) any allocations held by the FAA at the time of reauthorization may be redistributed among remaining certificate holders proportionate to the size of each certificate holder's current allocation; (3) the aggregate SFRA allocations will not exceed the number of commercial air tours reported to the FAA for the base year of May 1, 1997 through April 30, 1998; and (4) allocations may be transferred subject to several restrictions. The proposed restrictions on allocation transfer were as follows: (1) These transactions are subject to all other applicable requirements of this chapter; (2) allocations designated for the rest of the SFRA may not be transferred into the Dragon or Zuni

Point corridor, but allocations designated for the Dragon and Zuni Point corridor may be transferred into the rest of the SFRA; and (3) a certificate holder must notify the Las Vegas Flight Standards District Office within 10 calendar days of an allocation transfer.

This proposed section also contained a reversion provision whereby the allocations reverted back to the FAA upon voluntary cessation of commercial air tours in the GCNP SFRA for any consecutive 180-day period. Additionally, the FAA retained the right to redistribute, reduce or revoke allocations based on several conditions.

Property Interest: Papillon states that allocations must be considered a property interest; to not consider them as such would be tantamount to the unconstitutional seizure of property. This commenter states that their company and others have spent millions of dollars in the development of employees, facilities, equipment, marketing, promotion, good will, etc., yet the business would be of little value if allocations were only an operating privilege. Papillon believes that allocations if imposed must be an intangible asset belonging to each respective air tour company.

FAA Response: The FAA is adopting without change the limitation that allocations are not a property interest. Title 49 U.S.C. § 40103(a) states that the "United States Government has exclusive sovereignty of airspace of the United States." The FAA is authorized to develop plans and policy for the use of navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. *See* 49 U.S.C. § 40103(b). Under 49 U.S.C. § 44705(a), all air carriers or charter air carriers are required to hold an operating certificate issued by the FAA authorizing the named person to operate as an air carrier. This operating certificate is issued only after the FAA makes a

finding the "the person properly and adequately is equipped and able to operate safely under [the law]." Operating certificates may be amended, modified, suspended or revoked by the FAA as prescribed under Section 44709.

Thus, the FAA has been granted clear authority to regulate airspace and air carriers. The FAA has used this authority, together with its authority in Public law 100-91, to establish the GCNP SFRA and to regulate for noise efficiency. Given its clear mandate to regulate airspace, the FAA cannot grant property rights to an air carrier to use the airspace. Thus an allocation must be an operating privilege.

Two year limitation; Several air tour industry commenters believe that the two-year trial term for the proposed rule puts them at a severe hardship since they will be unable to predict the future of their business activity. These operators argue that the allocation system should not be imposed, but if adopted it should be guaranteed not to decrease.

Sunrise Airlines states that allocations assigned to each operator must not be decreased for a period of at least five years. Less than five years will discourage any potential movement towards quiet aircraft technology.

NATA states that the two-year term of the allocations would impair an operator's ability to invest in new equipment and technologies by allowing for further reductions in the number of tours permitted. NATA points out that operators must have some predictability with regards to the future level of activity in order to obtain financing for capital improvements, investment in quiet technology aircraft, and other business-related investments. In addition, because the allocation system is based on a review of only one year's operations, many businesses will experience significant

reductions in activity, further restraining the financial situation of the operators.

Some members of the Arizona State Legislature state that the noise evaluation methodology that will be used during the two-year period that flight limitations are imposed is a cause for great concern among air tour operators. The sound threshold set for Zone 2 is so low that aircraft will be unable to avoid exceeding it, thereby setting the stage for further restrictions at the end of the two-year period.

The Public Lands Committee of the Sierra Club, Utah Chapter, states that it conditionally supports the FAA capping the number of flight operations at 88,000 annually. However, this commenter cannot support the tentative "try it two years and then we'll see" aspect of the proposal.

FAA Response: The FAA is adopting the provision that permits it to reauthorize and redistribute allocations no earlier than every two years. This provision will require allocations to remain unchanged by the FAA for a twenty-four month period from the effective date of this rule. At the end of that time period, the FAA may, but is not required, to engage in another rulemaking to address additional data submitted under § 93.325, updated noise analysis or the status of the Comprehensive Noise Management Plan. The only way in which allocations could be changed in a shorter time period, would be if it were necessary for the FAA to utilize its authority to regulate for safety. Noise is not a component of the conditions in this section.

The FAA and NPS believe it is necessary to permit modifications of the allocations on a 2-year term based upon the results of additional noise analysis. This is to allow NPS the ability to address noise issues that arise that may impede its ability to meet the statutory goal of substantial restoration of

natural quiet as set forth in Public Law 100-91. Thus, for instance, if noise in the GCNP SFRA is increasing due to an increase in commercial SFRA operations, further limitations may be necessary.

The NPS acknowledges that efforts to achieve substantial restoration of natural quiet are path breaking, complex, and controversial. Perhaps the greatest confusion has resulted from the noise evaluation standards employed by the NPS, and specifically the "8 decibels below ambient." While the 8 decibels below ambient standard is a somewhat technical issue, it may be most easily thought of as a mathematical conversion factor necessitated by the computer modeling. The FAA's computer model (INM) uses a "weighting" (averaging) process to derive a single, "average" value to describe the ambient level. The NPS' computer model (NODSS) uses multiple frequency bands. NODSS, like the human ear, can discriminate sounds by both frequency and volume. It is well accepted in the acoustic community that sounds can be heard below the ambient level. In this case, aircraft sounds may be heard below the ambient level because the aircraft is producing sounds of a different frequency than found in the natural environment. Thus, to use INM and to capture the moment when aircraft become audible, a conversion of minus 8 decibels from natural ambient conditions is used. The minus 8 is derived from laboratory studies that showed that sounds of different frequencies become audible at between minus 8 and minus 11 decibels below ambient. To reiterate, the minus 8 decibels below ambient is not the sound level at which aircraft must operate or the acoustic level that must be achieved. It is a mathematical conversion necessitated by the computer modeling. The minus 8 decibels below ambient describes the "starting point" at which the measurement of substantial restoration begins.

Transfer. The Public Lands Committee of the Sierra Club, Utah Chapter, states that what is called for, given expiring time under the 1987 law and 1996 Executive Order, is a decreasing cap until operations are returned to approximately 1975 levels. Congress first identified the noise as a problem as far back as 1975, and Public Law 100-91 was the logical, decisive sequel for a problem only getting worse.

Windrock Aviation and Grand Canyon Air say that limiting the transfer of allocation destroys the value of the business that is entitled to make its profits from the allocation it is otherwise allowed. Additionally, these provisions, along with the provisions of the NPRM limiting the number flights that can be flown, generally, severely impact on the ability of those who might otherwise attempt to establish a profitable business in the flying of scenic tours at the GCNP. They believe that the economic impact of these issues was not raised in the NPRM. These commenters add that limitations on allocation transfer should be dropped from the NPRM, and that free market capitalism should be allowed to control what each individual operator does with its allocations.

ARA believes that allocation caps should not be transferable and supports the notion that allocations that fall into disuse be retired. The retirement of some allocations over time may prove to be the most viable method for reducing air tours toward levels of 1987. It is important not to squander the opportunity that the FAA has to maintain control over allocations of "time in airspace," not allow transfers of allocations between operators, and retire underutilized allocations.

The Environmental Coalition opposes any transfer of allocations from one corridor to another citing possible deterioration of conditions in less-noisy areas.

FAA Response: The FAA is adopting Section 93.321(b)(1)-(4) without modification. The purpose of this operations limitation is to maintain status quo and prevent the noise levels in the GCNP from increasing while the Comprehensive Noise Management Plan is developed. The limitation is not designed to be a declining cap. Thus the FAA is not adopting the request to impose a declining cap. Consistent with the intent of Public Law 100-91, as expressed in the legislative history surrounding the adoption of that law, the FAA is not attempting to ban air tours in the GCNP. It is seeking to make progress toward the mandated goal of substantial restoration of natural quiet.

Thus to provide the operations with some flexibility to meet varying demand, the FAA is permitting allocations to be transferred among air tour operators subject to three restrictions. First, all certificate holders are required to report any transfers to the Las Vegas Flight Standards District Office in writing. Permanent transfers (mergers/acquisitions) require FAA approval through the modification of the operations specifications. Temporary transfers (seasonal or monthly/weekly/daily leases) are effective without FAA approval. The FAA will not modify operations specifications for temporary arrangements.

Second, certificate holders are subject to all other applicable requirements in the Federal Aviation Regulations. Third, allocations authorizing commercial air tours outside of the Dragon or Zuni Point corridors are not permitted to be transferred into the Dragon or Zuni Point corridors. Allocations specified for the Dragon and Zuni Point corridors may be used to other routes in the GCNP SFRA. The FAA believes it is necessary to maintain some restrictions on allocation transfers to safety manage the airspace and manage aircraft noise. This is especially important since the Dragon and Zuni Point corridors tend to be the busiest locations in the park for air

tours. The FAA does not see any reason to limit transfer of allocations from the Dragon and Zuni Point corridor into the rest of the SFRA since this airspace is not as congested as these corridors and the noise level is not as high. Additionally, given the consumer demand to see the Dragon and Zuni Point corridors by air, the FAA does not believe that significant levels of tours will be transferred from those corridors into the rest of the SFRA.

Termination after 180-day lapse. Several air tour industry commenters state that the period allowed for inactivity should be lengthened. This is of particular concern for small operators that are susceptible to slow-downs inherent in the business.

Windrock and Air Grand Canyon (AGC) recommend that this provision be dropped. They note that it is possible for an operator to use all of its non-peak allocations early in the non-peak season and delay using its peak season allocations until a month after the peak season starts and thereby lose its allocations because of the 180-day lapse rule. These commenters maintain that this portion of the NPRM makes no logical, financial, or "noise reduction" sense. Windrock and AGC state that "the taking away of 'allocation' that has not been used for 180 days by any scenic tour operator is inconsistent with both the rights of the tour operators and the stated purpose of PL 100-91."

Papillon states that in fairness to all operators, but in particular small operators, the period allowed for inactivity should be lengthened. Small operators are most susceptible to slow downs caused by the seasonal nature of the business, equipment failures, serious illness of key employees or other adversities beyond the operators' control. Papillon proposes that subsequent to a 180-day inactive period, the FAA should secure a "Statement of Intent to Operate" from the tour operator. This statement would outline the operator's business

plan for the following three-year period. If upon the three-year anniversary of that statement, the operator has not resumed air tours or sold the business, the FAA would reassign its allocations on a pro rata basis to the other active operators.

AirStar Helicopters maintains that 180 days is too arbitrary and recommends a minimum of 360 days, especially in light of the "use it or lose it" provisions.

The proposed 180-day lapse period is supported by the Environmental Coalition.

FAA Response: This provision is adopted with the modifications discussed below. The FAA recognizes that the loss of an air tour operator's allocations would be a significant action. It is not the intent of this provision to be punitive. Rather the intent is to ensure that allocations are distributed amongst operators who are conducting an air tour business in the GCNP SFRA. The use or lose provision is important because it recognizes that the FAA is the sole controller of the allocations. If not used, the air tour operator will lose its allocations, thus its operating privilege in the GCNP SFRA, and the FAA will assert its control.

Based on comments from the air tour operators, the FAA, in consultation with NPS, is modifying this section to establish a show cause provision prior to the end of 180 consecutive days. Under this provision, an operator who does not use its allocations for 180 consecutive days, but who intends to do so in the future, must submit a written request for extension to the Las Vegas FSDO prior to the expiration of the 180-consecutive-day period. This written request must show why the operator did not conduct business during the prior 180 days and when it intends to resume business operations. In response the FSDO will issue a letter indicating whether the request for an extension is approved and the length of the

extension granted, if any, which will not exceed 180 consecutive days. Operators will be allowed to request one extension; thus the maximum amount of time an operator would be granted under the use or lose provision would be 360 days.

9. Flight Plans Section 93.323

This section of the NPRM proposed to require each certificate holder conducting a commercial SFRA operation to file an FAA visual flight rules (VFR) flight plan with an FAA Flight Service Station for each flight. Each flight segment (one take-off and one landing) would require a flight plan. Each certificate holder filing a VFR flight plan will be responsible for indicating in the "remarks" section of the flight plan the purpose of the flight. There will be at least six possible purposes: commercial air tour; transportation; repositioning; maintenance training/proving and Grand canyon West. The term "commercial air tour" will be as already defined in the proposed rule. The other five terms will be defined in the "Las Vegas Flight Standards District Office Grand Canyon National Park Special Flight Rules Area Procedures Manual" as follows:

1. Transportation—A flight transporting passengers for compensation or hire from point A to point B on a flight other than an air tour.

2. Repositioning—A non-revenue flight for the purpose of repositioning the aircraft (i.e., a return flight without passengers that is conducted to reposition the aircraft for the next flight).

3. Maintenance flight—A flight conducted under a special flight permit, or a support flight to transport necessary repair equipment of personnel to an aircraft that has a mechanical problem.

4. Training/proving—A flight taken for one of the following purposes: (1) pilot training in the SFRA; (2) checking the pilot's qualifications to fly in the SFRA in accordance with FAA regulations; or (3) an aircraft proving flight conducted in accordance with section 121.163 or 135.145.

5. Grand Canyon West flight—A flight conducted in accordance with conditions set forth in section 93.319(f).

One commenter explained that using flight plans to ensure compliance with the commercial air tour limitations is a flight safety hazard. If pilots are required to open VFR flight plans, an additional workload will detract from the necessary concentration in monitoring approach control and/or enroute frequencies while maintaining a constant visual vigil.

Air Vegas notes that its past experience with filing VFR flight plans was not positive. It encountered difficulty and confusion when numerous aircraft attempted to contact the flight service station to open VFR flight plans simultaneously. This commenter stats that the opening and closing of VFR flight plans by the pilots, particularly the opening, is unacceptable. The commenter says that all operators from Las Vegas follow the same route from Hoover Dam to the GCNP SFRA. Once inside the GCNP SFRA all aircraft are on the same route, which makes the airspace to and in the GCNP SFRA heavily concentrated. If pilots are required to open VFR flight plans, an additional workload will detract from the necessary concentration in monitoring approach control and/or enroute frequencies while maintaining a constant visual vigil.

FAA Response: This section is adopted with modification. The information obtained from the flight plan will be used to ensure compliance with the commercial air tours operation limitation. Certificate holders may wish to develop "canned"

flight plans that may be opened and closed quickly. Copies will not have to be maintained. The FAA does not believe this poses an unreasonable burden on the pilot since the pilot does not have to open or close the plan. The rule specifies that the certificate holder is responsible for filing a VFR flight plan. Thus the certificate holder must designate someone who will be responsible for this task. It could be a pilot or a dispatcher or someone else employed by the certificate holder who is assigned this duty. At this time, the FAA does not believe that there will be a resource problem at the flight service stations due to this new requirement. However, the FAA will be closely monitoring this situation and will take action to mitigate any problems that may develop. Certificate holders conducting operations under § 93.309(g) are not subject to the VFR flight plan requirements and must continue to file an IFR flight plan for GCNP SFRA operations in accordance with their operations specifications.

10. Reporting Requirements Section 93.325

The FAA also proposed to modify the reporting requirements by requiring quarterly reports instead of trimester reports. The FAA requested comments on requiring reporting from operators conducting operations in the GCNP SFRA under an FAA Form 7711-1. A question also was raised in the NPRM as to the time standard that should be used in the reports.

No comments were received on the switch from trimester to quarterly reporting. Several air tour industry commenters state that reporting requirements should not be imposed as a condition of FAA Form 771-1. Papillon states that the increased regulation of operations conducted under this form would harm the Native American Tribes who are the beneficiaries of these activities. Furthermore, these commenters state that since these forms are granted under tight restrictions there is no need for further control.

Several commenters suggest that Mountain Standard Time should be used for the quarterly reporting requirements. GCATC states that their membership is evenly divided on which time measurement to use.

The Environmental Coalition states that the reporting requirements should be applied to all commercial SFRA flights, including transportation, repositioning, maintenance, FAA Form 7711-1, and training flights. Complete reporting will allow better planning and evaluation of resource degradation.

FAA Response: The FAA is adopting this provision without modification. Therefore, under the Final Rule, all commercial SFRA operations, including those conducted under §§ 93.309(g) and 93.319(f), must be reported on a quarterly basis to the Las Vegas Flight Standards District Office. Since commenters are divided on the time measurement issue, the FAA has decided that operators are required to report operations using UTC time. The information submitted in these reports will be used by the FAA and NPS to assess the noise situation in the GCNP and in development of the Comprehensive Noise Management Plan. Certificate holders will continue to submit their reports in written form. Electronic submission is preferable and encouraged.

Additionally, the FAA will require operators conducting operations under an FAA Form 7711-1 to report those operations to the Las Vegas FSDO. The FAA and NPS need this information to develop a clearer picture of the types and numbers of flights operating in the GCNP SFRA. The reporting will be set forth as a condition of the FAA Form 7711-1. This requirement will apply to public aircraft, such as NPS aircraft, as well. The FAA does not believe requiring operators to report FAA Form 7711-1 flights will harm the Indian tribes.

The reporting requirements will become effective 30 days after publication. Because the rule is being implemented after the start of a quarter, operators will report 30 days after the close of the first trimester (January-April) under the old rule, 30 days after the end of June for the May-June time period. July 1st would then start the quarterly reporting requirement.

Paperwork Reduction Act

Information collection requirements pertaining to this final rule have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), and have been assigned OMB Control Number 2120-0653. No comments were received on this information collection submission. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA determined that there are no ICAO Standards and Recommended Practices that correspond to these regulations.

Regulatory Evaluation Summary

This rule is considered significant under the regulatory policies and procedures of the Department of Transportation (44 FR 11034; February 26, 1979) but is not considered a significant regulatory action under Executive Order 12866.

Proposed and final rule changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980, as amended March 1996, requires agencies to analyze the economic effects of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to assess the effects of regulatory changes on international trade.

The final rule will impose a significant economic impact on a substantial number of small entities. In terms of international trade, the rule will neither impose a competitive trade disadvantage to U.S. air carriers operating domestically nor to foreign air carriers deplaning or enplaning passengers within the United States. This rule does not contain any Federal intergovernmental or private sector mandates. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

The FAA analyzed the expected costs of this regulatory proposal for a 10-year period (2000 through 2009). All costs in this analysis are expressed in 1998 dollars.

This summary examines the costs and benefits of the final rule that will temporarily limit the number of commercial air tours that may be conducted in the Special Flight Rules Area (SFRA) of the Grand Canyon National Park (GCNP). This rule is necessary as part of an effort to achieve the statutory mandate imposed by Public Law 100-91 to provide substantial restoration of natural quiet and experience in GCNP.

The estimated 10-year cost of this regulation will be $ 155.4 million ($ 100.3 million, discounted). The majority of the impact of this regulation will be $ 154.3 million, ($ 99.6

million, discounted) in lost revenue (net of variable operating costs) due to the imposition of air tour operations limits. After two years, this requirement may be reviewed and subject to change. At the end of the two years review, the cost in lost revenue will be $ 13.2 million ($ 11.9 million, discounted). The status of the quiet technology rulemaking and the Comprehensive Aircraft Noise Management Plan will also be taken into consideration at that time. The estimated 10-year cost of the other provisions to air tour operators is $ 30,000 or $ 23,000, discounted. FAA costs are estimated at $ 1.06 million or $ 746,400, discounted over ten years.

The primary benefit of this rule is its contribution toward meeting the statutory mandate of substantially restoring natural quiet in GCNP. Quantifiable benefits are the use benefits perceived by individuals from the direct use of a resource such as hiking, rafting, or sightseeing. The estimated 10-year use benefits for ground visitors only, as a result of this rule, are $ 20.36 million, discounted at 7 percent. In addition to these use benefits, this rulemaking may generate non-use benefits. The non-use benefits of this rulemaking along with the associated rule and commercial air tour routes notice include reduction in existing commercial air tour aircraft noise impacts to certain traditional cultural properties of importance to several Native American Tribes and Nations in the vicinity of the Grand Canyon National Park. Related benefits to these Native Americans include protection of their religious practices from interference from overhead commercial air tour aircraft flights. The FAA, at this time, does not have adequate data to estimate these non-use benefits of commercial air tour aircraft noise reduction at the Grand Canyon National Park and adjacent traditional cultural properties, but believes that they are significant. The FAA is promulgating this rule in response to congressional mandate.

Commercial Air Tour Industry Profile

The Grand Canyon is the most active commercial air tour location in the United States. Based on Grand Canyon air tour operator reports, requirements contained in § 93.317, and comments containing additional statistical detail, the FAA has revised its original estimates for the first full year of reporting (May 1, 1997 through April 30, 1998)—hereafter referred to as the baseline period, from approximately 88,000 to 90,000 commercial air tours. These air tours provided aerial viewing of the Canyon to about 642,000 passengers, and accounted for just under $ 100 million ($ 99.3 million) in revenue. In the baseline period there were 24 air tour operators reporting, 17 of whom conducted air tours over GCNP in airplanes, 6 in helicopters, and 1 operator in a mixed fleet.

Benefits

The primary intended benefit of this rule is its contribution toward achieving the statutory mandate imposed by Public Law 100-91 to substantially restore natural quiet in GCNP. The FAA's and NPS' benefits analysis is limited to commercial air tour aircraft noise because only commercial air tours will be affected by this rule.

The policy decision of GCNP is that a substantial restoration requires that 50% or more of the park achieve "natural quiet" (i.e., no aircraft audible) for 70-100 percent of the day. That level of "quiet" (50 percent) does not exist today in the park, in spite of past actions to limit noise. Based on noise modeling, the FAA estimates that today only about 32 percent of the park area has had natural quiet restored. Furthermore, if no additional action is taken, estimated future air tour growth will reduce that number to about 25 percent in 9 to 10 years. On the other hand, noise modeling indicates that this rule, together with the other two FAA actions, will increase

the restoration of natural quiet to slightly more than 41 percent and maintain that level in the future. The FAA will monitor future operations in the park to determine the actual level of natural quiet that is restored.

Increased Value of Ground Visit Analysis

The benefits of aircraft noise reduction attributable to this rulemaking can be broadly categorized as use and non-use benefits. Increased use benefits from reduced aircraft noise are the added benefits perceived by ground visitors from the direct use of a resource such as hiking, rafting, or sightseeing. However, use benefits also include the benefits perceived by individuals taking air tours. If restrictions are imposed on air tour operations, some of the use benefits perceived by individuals taking air tours will be lost. The benefits to air tourists have not been quantified due to a lack of information. The benefits to ground visitors due to this rulemaking have been quantified and are presented below. Non-use benefits are the benefits perceived by individuals from merely knowing that a resource exists, or is preserved, in a given state. The non-use benefits attributable to this rulemaking have not been estimated.

An economic study has not been conducted specifically to estimate the benefits of this rulemaking. While generally accepted methodologies exist to estimate such values, those techniques are costly and require a significant period of time for the requisite study design, data collection, and analysis steps. An alternative to these resource-intensive techniques is the "benefits transfer" methodology. That methodology combines value estimates from existing economic studies with site-specific information (in this case, regarding visitation levels and the nature and extent of noise impacts) to estimate benefits. The benefits transfer methodology has been accepted as an appropriate methodology for estimating natural resource values in two other rulemakings.

The benefits transfer methodology was used to estimate the benefits of this rulemaking where sufficient information existed to do so. This estimation was possible for ground visitors to GCNP, but not for air tourists or for the non-use benefits.

Benefits of Ground Visitors

The site-specific information used in the estimation of benefits accruing to ground visitors includes visitation data for GCNP for calendar year 1998 and a visitor survey conducted to document the visitor impacts of aircraft noise within GCNP. The available visitation data for GCNP permits the categorization of visitors into backcountry users, river users, and other visitors. The activities included in the "other visitors" category primarily involves canyon rim sightseeing, as well as other activities not related to backcountry or river use. The total number of visitor-days in 1998 for these visitor groups was 92,100 for backcountry, 66,900 for river and 5.31 million for "other visitors".

For purposes of this benefits estimate, the number of visitor-days at GCNP is assumed to remain constant at 1998 levels throughout the evaluation period of the rulemaking. The GCNP visitor survey indicates that these different visitor groups are variously affected by aircraft noise. This survey asked respondents to classify the interference of aircraft noise with their enjoyment of GCNP as either "not at all", "slightly", "moderately", "very much", or "extremely".

The economic studies selected for use in the benefits transfer discuss visitor-day values, which are also known as "consumer surplus". Consumer surplus is the maximum amount an individual would be willing to pay to use a resource, minus the actual costs of use. It is a measure of the net economic benefit gained by individuals from participating in recreational activity.

The visitor-day value for backcountry use, $ 37.13, was derived from a national study of outdoor recreation. The visitor-day value for river use, $ 92.44, was derived from the economic analysis contained in the Final Environmental Impact Statement for Glen Canyon Dam operations. The visitor-day value for all other visitor uses in GCNP, $ 48.72, was derived from an economic analysis of recreation at Bryce Canyon National Park.

FAA assumed that these visitor-day values represented the net economic benefits obtained from recreational uses in GCNP absent any impacts from aircraft noise. Therefore, it is important to note that these values potentially under-state recreational benefits to the extent that they were estimated in conditions where aircraft noise was present.

There is no known economic study that estimates the reduction in the value of recreational uses due to aircraft noise for areas similar to GCNP. Therefore, reductions were assumed in the present analysis. The data and assumptions imply the total value of $ 17.7 million, which was calculated as the product of the number of visitor-days, the proportion of visitors affected by aircraft noise, the visitor-day value, and the assumed proportional reduction in the visitor-day value, for respective impact levels and visitor categories.

The benefit of this rulemaking is that portion of the total lost value that is associated with the resulting future levels of noise reduction. Through aircraft noise modeling, FAA has predicted the number of square miles within GCNP that would be affected by various levels of aircraft noise, both with and without the commercial air tour limitation.

The reductions in aircraft noise were applied to the total lost consumer surplus value from all aircraft noise in 1998

($ 17.73 million) to estimate the current use benefits for future years. This calculation assumes that benefits increase linearly with noise reduction (i.e., a constant marginal benefit from noise reduction). The resulting use benefit estimates the sum to $ 31.29 million ($ 25.83 million at the 3 percent discount rate and $ 20.36 million at the 7 percent discount rate) over ten years. The use benefits for this rule and the airspace final rule will be $ 45.86 million over ten years, discounted at 7 percent.

Benefits of Air Tourists

The use benefits perceived by individuals taking air tours will likely decrease as a result of this rulemaking. This is due to a reduction in the number of air tours that will be available because of the commercial air tour limitation. FAA estimates that the number of commercial air tours in GCNP would increase an average of 3.3 percent per year without this rulemaking. The effect of the commercial air tour limitation will be to control the number of air tours on affected routes by limiting the amount of growth that would otherwise occur.

FAA estimates that commercial air tours serving approximately 530,000 air tourists in the base year will be subject to the limitation. Assuming that the passenger capacity and load factors for commercial air tours remain constant, the impact of the commercial air tour limitation will be to eliminate the average 3.3 percent annual growth rate in air tourists that would otherwise occur.

The FAA was unable to estimate the visitor-day value of air tourists, given the available data. Nevertheless, an average visitor-day value for air tourists that exceeds the visitor-day value for ground tourists would suggest the use benefit losses of air tourists exceed the use benefit gains of ground tourists. The undiscounted total use benefits of ground tourists from 2000 to 2009 was estimated above as $ 31.29 million, given the

commercial air tour limitation only. Dividing that value by the estimated 1,490,000 individuals who will be potentially excluded from taking air tours over the same period indicates a threshold value for air tourists of $ 18.70 per visitor-day. The threshold value for air tourists given both the commercial air tour limitation and route changes is $ 40.06 per visitor-day.

It is important to recognize that this simple analysis of air tourist use benefits does not necessarily indicate a complete loss of benefits associated with this rulemaking. As noted above, increases in either the passenger capacity or load factors of affected flight operations will decrease the reduction in use benefits of air tourists.

Benefits to Native American Communities

Benefits of this rulemaking and the associated airspace rulemaking and the changes to the commercial air tour routes also include those accruing to several local native American cultural and religious practices. The overall size of the 20 LAEQ 12hr noise exposure area over tribal lands will be reduced as a result of these actions. This rulemaking and related actions will also reduce air tour aircraft noise levels from the existing noise levels over certain traditional cultural properties and ensure increased privacy and protect Native American religious practices (however, some traditional cultural properties in the vicinity of the direct routes from Las Vegas to the Grand Canyon Airport will receive an increase in noise).

Costs of Compliance and Regulatory Flexibility Determination and Analysis

The FAA estimates that the regulation will result in a potential reduction in future net operating revenue of $ 154.3 million ($ 99.6 million, discounted). Additionally, the FAA

estimates that there would be approximately $ 22,320 ($ 20,860 discounted) start-up costs to operators to implement the flight plan (i.e., filing, activating, and closing a flight plan) adopted from this rulemaking. For quarterly reporting and the other provisions of the rule ((1) requesting modification and initial allocations and (2) transfer of allocations), the cost to air tour operators is estimated to be $ 30,000 over ten years or $ 23,000, discounted. Finally, the FAA costs over the next 10 years (including initial allocations) will be $ 1.06 million or $ 746,400 discounted. In sum, the total cost of this rule over the next 10 years will be $ 155.4 million or $ 100.3 million, discounted.

The main economic impact resulting from the commercial air tour limitation in the GCNP SFRA is the reduction in potential future net operating revenue. This can be calculated by subtracting the net operating revenue associated with the projected future number of commercial air tours under the air tour limitation from the net operating revenue associated with the projected future number of commercial air tours without the air tour limitation.

The baseline period gross operating revenue by route was calculated by multiplying the estimated number of passengers that flew on a specific route for a specific operator by the published retail fare. Variable operating costs for GCNP air tour operators are defined as the costs for crews, fuel and oil, and maintenance per flight hour. Baseline net operating revenue for each aircraft by route is the difference between the gross operating revenue for each route by aircraft and the variable operating costs for each route by aircraft. An air tour operator's total net operating revenue is the sum of the net operating revenues from all of the routes used by that air tour operator.

Commercial air tours in GCNP currently are fixed to the extent that air tour operators cannot increase the number of aircraft shown on their operations specifications for use in the GCNP SFRA. The FAA estimated the future number of monthly operations without the final rule. In some cases, it would not be practically feasible to conduct more air tours in a given day because the aircraft were already used to their fullest extent practical.

The final rule assumes that the allocations awarded to each operator will be valid for a two-year period. After that time, the air tour operator's allocations may be revised for various reasons. In this analysis the FAA assumed that this allocation would continue beyond two years.

The analysis does not take into consideration that air tour operators could switch from smaller-sized aircraft to larger-sized aircraft. Consequently, in this analysis, the number of available seats is fixed throughout the entire time period. Holding the number of seats constant and assuming that more individuals will want to take air tours in the future implies that air tour operators should be able to raise air tour prices. This analysis does not consider a new equilibrium price given that supply becomes fixed while demand increases.

Cost of Operating Scenario to Operators—
Uniform Year With No Peak/Off Peak
Delineation on Commercial Air Tours

In the final rule, the FAA is not adopting either peak season apportionment for allocations discussed in the NPRM Based on these decisions:

• After the first two years, the certificate holder's allocations may be revised based on the data submitted under

§ 93.325, an updated noise analysis, and/or the status of the Comprehensive Noise Management Plan.

• Allocations will be separated into those that may be used in the Dragon and Zuni Point corridors and those that may be used in the rest of the SFRA except in the Dragon and Zuni Point corridors. Dragon and Zuni Point corridor allocations again will be determined based on the number of operations an air tour operator conducted in this region for the base year period. Operators conducting no operations in these corridors for the base year will receive no allocations for this region.

The final rule will limit all commercial air tours in the GCNP SFRA on a 12 month basis so that such operations conducted by certificate holders in the SFRA do not exceed the amount of air tours reported in accordance with current § 93.317 for the base year. The number of commercial air tours that a certificate holder can conduct will be shown on the certificate holder's operations specifications as allocations.

Revisions in Accordance With Specific Rule Changes in Consideration of the Hualapai Tribe and Substantial Economic Impact

Ninety percent of the helicopter and 10 percent of the airplane tours that are conducted along the SFAR 50-2 Green 4 and Blue 2 air tour routes respectively, land on the Hualapai Indian Reservation (the Reservation) either along the Colorado river, at Grand Canyon West Airport (GCW), or both. Both the helicopter and airplane tours landing at the Reservation are a significant source of income and employment to the Hualapai Indian Nation (the Tribe).

The Hualapai Reservation encompasses approximately 1 million acres adjoining the southwestern quadrant of GCNP and includes 108 miles of the Colorado River through the Grand

Canyon. The majority of the Reservation's inhabitants live below the poverty level and unemployment was estimated in 1995 to range from 50-70 percent of the adult population. Much of the Tribal economy is based on tourism, and Grand Canyon West has been identified by the Tribe as the primary means by which to address its high unemployment rate while preserving the Tribe's natural and cultural resources.

In the NPRM, the FAA considered the impact of an operations limitation on the Tribe within the context of the 2.5 multiplier. However, the FAA, through comments and testimony offered at the Las Vegas public hearing held in August 1999, believes the direct impact to the Tribe is more severe than initially believed. Therefore, in this Final rule, the FAA will not impose a limitation on certain air tours to the Reservation due to the significant adverse economic impact on the Tribe so long as these tours are operated in compliance with § 93.319(f).

The FAA is adopting May 1, 1998 through April 30, 1999 as the more appropriate baseline to assess its cost relief estimates for the Tribe because the FAA believes this baseline more accurately portrays the current economic activity at GCW and the Reservation. After the completion of federally funded airport renovations and runway resurfacing during the fall of 1997, there was a significant increase in air tours and tourism to the Reservation. In addition, a helicopter operator, well established in the Tusayan air tour market, expanded operations to the West end and began conducting helicopter tours in support of the Tribe after the close of the May 1, 1997 through April 30, 1998 baseline period.

Comparing May 1, 1998 through April 30, 1999 to the May 1, 1997 through April 30, 1998 baseline, the FAA estimates that all applicable air tours increased to about 21,850 (10,950 airplane; 10,900 helicopter). The Tribe collects at least $ 2.3

million annually from air tour operators in the form of landing fees, monthly leases, trespass permits and per passenger payments for a Reservation guided tour and lunch plus an unspecified amount derived from passenger purchases of crafts and souvenirs.

Assuming the 3.3 percent compound annual rate of growth, the FAA estimates that in the absence of an exception being extended to the applicable air tours, the Tribe would forego the potential revenue generated from an additional 25,700 air tours carrying 133,900 over the 2000-2009 time period. The restoration to the Tribe of future revenue over the years 2000-2009 resulting from the elimination of operations limitations on those tours will be approximately $ 643,400 in landing fees and $ 4.3 million in ground tour revenue. This action, then, removes a restraint placed on the Tribe's uninterrupted access to these air tours and their passengers, the principal revenue source for the Reservations's continued economic development, and the FAA estimates that this cost relief will be $ 4.9 million ($ 3.1 million, discounted) over the next ten years.

To remain consistent with the overall Regulatory Evaluation and costs of this Final Rule, the analysis that follows concerning the operators and tours that are conducted to GCW Airport and the Reservation will use the May 1, 1997 through April 30, 1998 baseline. From this baseline data, the FAA estimates that about 19,200 (11,300 airplane; 7,900 helicopter) air tours were conducted along the Blue 2 and Green 4 air tour routes. These air tours were conducted by 10 airplane and 4 helicopter operators, and carried approximately 119,000 passengers that generated $ 19.9 million in gross operating revenue ($ 16.2 million in net operating revenue). Using the 3.3 percent compound annual rate of growth, if no exception were granted, the FAA estimates that the total cost of the final rule will be $ 198.4 million. The part of this final rule cost

attributable to an operations limitation along these two air tour routes would be approximately $ 58.3 million ($ 37.6 million, discounted) in gross operating revenue losses and $ 48.3 million ($ 31.4 million, discounted) in net operating revenue losses for the years 2000 through 2009.

By excepting the air tours of the operators maintaining valid contracts with the Tribe that are conducted along these two air tour routes, the FAA has reduced the overall cost (net operating revenue) of this Final Rule by $ 43.9 million ($ 28.5 million, discounted) to $ 154.5 million ($ 99.5 million, discounted) for the ten-year period 2000-2009. These amounts were calculated based on an estimated reduction in air tours and air tour passengers of approximately 51,550 and 320,500, respectively, for the same ten-year time frame. Thus, by excepting those air tours conducted along these two air tour routes that are in support of the Tribe, the FAA estimates that the actual amount of the cost contributed to the total cost of this final rule will be reduced to $ 5.1 million ($ 3.3 million, discounted) in gross operating revenue losses and $ 4.5 million ($ 2.9 million, discounted) in net operating revenue losses for the years 2000 through 2009.

In the absence of the exception, the FAA estimates the portion of the above costs that are directly associated with a 3.3 percent growth in the current level of tours conducted along the two air tour routes in support of Tribal economic development is $ 34.2 million ($ 20.2 million, discounted) in reduced gross operating revenue and $ 31.2 million ($ 20.25 million, discounted) in reduced net operating revenue over ten years. This is based on reductions in air tours and passengers of 22,000 and 119,200, respectively, resulting from the operations limitation part of the final rule.

The FAA does not have data indicating the percentage of air tours reported in the baseline period that landed at the

Reservation. Thus, those operators who currently hold contracts with the Hualapai will also receive their allocations as originally established. The FAA estimates that the non-Hualapai portion of the air tour business conducted by these operators along these two routes could expand at 3.3 percent for twelve years before the cost impact of the operations limitation becomes measurable. Thus, during the ten-year time frame 2000-2009, there will be no costs incurred by operators maintaining contracts with the Tribe for that portion of their air tour business conducted along these two routes that does not necessarily contribute to the economic development of the Tribe. The FAA estimates that the portion of the above costs associated with a 3.3 percent growth in the current level of non-Hualapai tours conducted along the two air tour routes is $ 19.0 million ($ 12.3 million, discounted) in reduced gross operating revenue and $ 12.7 million ($ 8.2 million, discounted) in reduced net operating revenue for the years 2000-2009.

By extending an exception from the operations limitation part of the final rule to those air tours and air tour operators who maintain contracts with and provide economic support to the Tribe, the FAA estimates the final costs of this rule attributable to air tours conducted along these two air tour routes will be reduced to $ 5.1 million ($ 3.3 million, discounted) in gross operating revenue and $ 4.5 million ($ 2.9 million, discounted) in net operating revenue for the years 2000-2009.

The overall total cost relief accruing to the operators for the years 2000-2009 provided in this Final Rule by excepting the air tour businesses that maintain contracts with the Tribe from the operations limitation component is estimated to be $ 53.2 million ($ 34.3 million, discounted) in gross operating revenues and $ 43.9 million ($ 28.5 million, discounted) in net operating revenues. Therefore, by excepting the air tours along these two air routes that are conducted in support of the Tribe, the FAA

has reduced the overall cost (net operating revenue) of this Final Rule to $ 155.4 million ($ 100.3 million, discounted) for the ten-year period 2000-2009.

Cost of Reporting Requirements to Operators

The FAA considered two reporting requirement alternatives in the NPRM, these being quarterly reporting and trimester reporting. The existing rule requires certificate holders to report three times annually, but the final rule will change this to quarterly reporting, in § 93.325. Since the existing rule already requires certificate holders to establish a system to implement the reporting requirement, the FAA assumed there will be no start-up costs to implement this requirement.

Under the reporting requirement scenario, the written information will have to be provided to the Las Vegas FSDO four times per year. The FAA assumes that each operator will have to collate and verify the information that they have been collecting throughout the year. The time it takes to complete these two tasks would be 2 hours per operator regardless of the number of aircraft; this assumes that the operators have been recording the information throughout the year. The total incremental cost to the industry to move to quarterly reporting is estimated at $ 11,000 for 10 years or $ 8,600, discounted.

The FAA considered two alternative means of monitoring the allocations, a form system and the filing of flight plans, in the NPRM. The requirement to file a flight plan is in the final rule. Section 93.323 of the final rule will require each certificate holder conducting a commercial SFRA operation to file a visual flight rules (VFR) flight plan with an FAA Flight Service Station for each such flight. A flight consists of one take-off and one landing. The "remarks" section of the flight plan will be completed to indicate the purpose of the flight out

of six designated purposes. The information obtained from the flight plan will be used to ensure compliance with the commercial air tour limitation. Copies will not have to be maintained by the certificate holder or carried on board the aircraft.

The extent to which an operator will be impacted will depend upon the volume of his/her commercial air tour business in GCNP and the number of aircraft and pilots providing air tour service. Additionally, the cost impact will be influenced by whether the operator conducts air tours daily on a regular frequency.

Relying on information from the Las Vegas FSDO, the FAA has identified the following four principal areas where start up costs for the larger, more regularly scheduled operators will be incurred: (a) Creation of "canned" VFR flight plans (templates) to be filed with the Reno or Prescott Flight Service Station; (b) rewriting of existing General Operations Manuals to incorporate the new procedures; (c) set-up of a pilot training program; and (d) training of pilots. The FAA assumes the first three tasks and possibly the fourth, the instructing of the pilots in the new procedures, will be the responsibility of each operator's Director of Operations. The FAA estimates that the total initial fixed costs to the Grand Canyon air tour operators for the VFR flight filing requirements will be about $ 22,300 or $ 20,900, discounted.

Cost of Other Provisions to Operators

Operators will incur costs associated with (1) requesting modification and allocations and (2) transfer of allocations. The FAA estimates that the cost of these provisions can be up to $ 20,000 or $ 14,000, discounted over 10 years.

The FAA recognizes that the air tour business in the GCNP is constantly changing. Thus, due to mergers/acquisitions, bankruptcies, etc., certificate holders may believe that the data submitted for May 1, 1997 to April 30, 1993 was not reflective of their business operations. Therefore, the FAA permitted any certificate holder who believed that the base year data does not reflect its business operation to submit a written statement requesting that its initial allocation be revised.

Ten operators requested modifications to their proposed initial allocations following publication of the NPRM. The one-time cost to the industry would be between $ 2,500 and $ 5,000 (which includes ten days or 80 hours of effort) or between $ 2,300 and $ 4,700, discounted.

The FAA also recognizes that air tour operators often utilize a variety of contracting/subcontracting methods to handle passenger loads during busy periods. Therefore, the FAA will allow an allocation to be transferred among certificate holders, subject to the restrictions enumerated in the Preamble of this rule. Under the final rule, all certificate holders are required to report any transfer of allocations to the Law Vegas FSDO in writing. The FAA distinguishes between temporary and permanent transfers of allocations.

The FAA assumes any operator costs associated with temporary transfers to be part of the on-going business cost of conducting air tours of the Grand Canyon and views such costs as de minimus. Permanent transfers of allocations resulting from mergers/acquisitions, bankruptcies, or other reasons that affect operations, will require FAA approval through the modification of the operations specifications in addition to the required reporting to the Law Vegas FSDO in writing.

For this analysis, the FAA assumes two operator transfers per year. The annual cost to the industry will be between

$ 1,000 and $ 2,000 annually (about a total of 32 hours annually) or between $ 900 and $ 1,900, discounted. The cost over 10 years will be between $ 10,000 and $ 20,000 or between $ 7,000 and $ 14,000, discounted.

Cost of the Final Rule to the FAA

The FAA, as a result of this rule, will incur costs associated with the initial allocation, recording and tracking, filing of flight plans, and transfer of allocations. Over the next 10 years, FAA costs are expected to be $ 1.06 million or $ 746,400 discounted.

Under this final rule, each certificate holder reporting commercial air tours to the FAA in accordance with current § 93.317 will receive one allocation for each air tour conducted and reported during the base year period. Certificate holders identified in the NPRM as receiving allocations to conduct air tours in the SFRA received written notification of their allocations.

The FAA will need to develop an allocation process and prepare the necessary information to send to each air tour operator. This one-time administrative work will require analyst, clerical, legal, and management resources. The FAA assumes that it will take about two weeks to set up a spreadsheet and prepare the necessary information to send to each air tour operator. The initial cost to implement this part of the rule will be $ 3,800 in the first year only.

In addition, the FAA will incur recurring annual costs from the recording and tracking of the information provided by the operators. Again, this will require analyst, clerical, legal, and management resources. The agency estimates that the total cost of these elements would be about $ 99,300 annually and $ 992,800 over ten years ($ 697,300, discounted).

Allocations to conduct air tour operations in the GCNP SFRA will be an operating privilege initially granted to the certificate holders who conducted air tour operations during the base year and reported them to the FAA. This allocation will be subject to reassessment after two years.

The FAA estimates that, on average, the FAA will spend about 80 hours managing the transfer of allocations from each merger or 160 hours annually assuming two mergers, transfers, etc. annually. The FAA estimates that cost will be about $ 6,500 annually or $ 64,800 over ten years or $ 45,500, discounted.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities (small business and small not-for-profit government jurisdictions) are not unnecessarily and disproportionately burdened by Federal regulations. The RFA, which was amended March 1996, requires regulatory agencies to review rules to determine if they have "a significant economic impact on a substantial number of small entities." The Small Business Administration defines airlines with 1,500 or fewer employees for the air transportation industry as small entities. For this final rule, the small entity group is considered to be operators conducting commercial air tours in the GCNP SFRA and having 1,500 or fewer employees. The FAA has identified a total of 25 such entities that meet this definition.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis (RFA) as described in the Act.

The FAA has estimated the annualized cost impact on each of these 25 small entities potentially impacted by the rule. The final rule is expected to impose an estimated total cost on operators of $ 155.4 million ($ 100.3 million, discounted). The average annualized cost over ten years is estimated at about $ 960,000 for each operator (with a range of $ 200 to $ 6.3 million). The FAA has determined that the rule will have a significant impact on a substantial number of small entities, and has performed a regulatory flexibility analysis. As discussed above, most small entities will incur an economically significant impact.

Under Section 603(b) of the RFA (as amended), each regulatory flexibility analysis is required to consider alternatives that will reduce the regulatory burden on affected small entities. The FAA has examined several alternative provisions of this final rule that will be discussed below. In addition, the FAA is also required to address these points: (1) Reasons why the FAA is considering the rule, (2) the objectives and legal basis for the rule, (3) the kind and number of small entities to which the rule will apply, (4) the projected reporting, recordkeeping, and other compliance requirements of the rule, and (5) all Federal rules that may duplicate, overlap, or conflict with the rule.

Reasons Why the FAA Is Considering the Final Rule

Public Law 100-91 recognizes that noise associated with "aircraft overflights" at the GCNP is causing "a significant adverse effect on the natural quiet and experience of the park." This legislation directed the NPS to develop recommendations to achieve the substantial restoration of natural quiet in GCNP. The FAA was directed, pursuant to Public Law 100-91, to implement these recommendations unless there was a safety reason not to do so. The FAA and NPS believe it is necessary to impose a commercial air tour limitation in order to stabilize

noise levels in the SFRA while further noise analysis is conducted.

The Objectives and Legal Basis for the Final Rule

The objective of the final rule is to limit all commercial air tours in the GCNP SFRA on a 12-month basis. Commercial air tours conducted by certificate holders in the SFRA are not to exceed the amount of air tours reported in accordance with current § 93.317 for the period from May 1, 1997 through April 30, 1998.

The legal basis for the rule is found in Public Law 100-91, commonly known as the National Parks Overflights Act. Public Law 100-91 stated in part, that "noise associated with aircraft overflights at GCNP [was] causing a significant adverse effect on the natural quiet and experience of the park and current aircraft operations at the Grand Canyon National Park have raised serious concerns regarding public safety, including concerns regarding the safety of park users." Further congressional direction is discussed in the history section of this regulatory evaluation.

The Kind and Number of Small Entities to Which the Final Rule Would Apply

The final rule applies to 24 affected part 135 and part 121 commercial air tour operators, each having 1,500 or fewer employees. The FAA estimates that all 24 operators (25 entities) will be impacted by the final rule. The FAA has limited financial profile information (e.g., operating revenue, operating expenses, operating profit, net operating revenue, and passenger revenue) for six of the impacted operators. Balance sheet information on assets and liabilities is not readily available. However, the FAA received financial information from two air tour operators; a summary of their submitted

material is discussed in the Appendix to the full economic analysis.

The Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule

Each of the operators affected by this rule will need to comply with certain reporting requirements. Certificate holders conducting commercial SFRA operations will complete a flight plan for each flight. The FAA estimates this compliance effort can impose an additional one to five minutes on the part of the certificate holder per operation for each of the small entities during each year of compliance, for a total of 4,500 hours annually.

In addition, certificate holders conducting commercial air tours will need to report quarterly to the FAA certain information on the total operations conducted in the SFRA to the FAA. The FAA estimates that this compliance effort will take place four times per year (one additional time compared to the current rule) and will impose an additional 50 hours of labor on the industry annually. This provision will cause an operator, regardless of the number of aircraft, to expend an additional 2 hours of labor annually (including record maintenance).

The initial assigned allocation involved operator requests for modifications that the FAA estimates will impose about 1 to 2 person days of added work. Ten operators requested modification to their allocations. As discussed above, the FAA estimates that the paperwork burden to each of these firms will range from 8 to 16 hours.

Finally, the FAA assumes that no more than 2 operators each year are likely to submit requests for permanent transfers of allocations (e.g., to enter, leave or merge). The FAA

estimates that the two firms will spend about 32 hours annually preparing the required documentation to be submitted to the FAA.

Excluding the provisions that impose a one-time burden (initial allocations that will affect five operators the first year annually of 80 hours total), the FAA estimates each certificate holder will have imposed an additional annual reporting burden on average of 575 hours of labor. Over a period of 10 years, a total of approximately 143,750 hours will be spent.

All Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

The FAA is unaware of any federal rules that either duplicate, overlap, or conflict with the final rule.

Alternatives

Aircraft noise in the GCNP can be controlled in a number of ways. Hence, noise-reducing measures can be accomplished through any one or a combination of these methods. As directed by Public Law 100-91, NPS developed a number of recommendations to substantially restore natural quiet. These recommendations were included in NPS' 1994 Report to Congress. These recommendations included a number of different approaches to achieving the statutory mandate of Public Law 100-91. Some of these recommendations were adopted in 1996. Others have been under consideration. The following summarize the status of each of these recommendations:

Altitude Restrictions

As one alternative, aircraft could be required to fly above specific altitudes in certain parts of GCNP. The noise

generated by these aircraft flying at higher altitudes would be more widely dispersed before it reached the ground than if these aircraft were flying at lower altitudes. Ground visitors would then be less likely to hear the aircraft the higher up they are flying. Air tour passengers, however, would see less dramatic views of the Grand Canyon when flying at higher altitudes.

The FAA has adopted this approach as one of the several options it is using to control aircraft noise in GCNP. On May 27, 1998, the FAA issued SFAR No. 50-2. This SFAR established four flight-free zones from the surface to 14,499 feet above mean sea level in the area of the Grand Canyon. It also prohibited flight below a certain altitude in certain sectors of the Grand Canyon. On December 31, 1996, the FAA issued a final rule (61 FR 69302) which raised the ceiling of the SFRA to 17,999.

Establishment of Air Tour Routes

Another approach used by the FAA is to contain aircraft noise to certain parts of the Grand Canyon by establishing air tour routes. On May 27, 1998, the FAA issued SFAR No. 50-2, which provided for special routes for air tours. On December 31, 1996, the FAA issued a final rule (61 (FR 69302) which established a new FFZ and altered the boundaries of the other already established FFZs. This rule change necessitates a change in the air tour routes, which the FAA will establish next year (enforcement of the airspace actions in 61 FR 69302 has been delayed until after the establishment of these new routes).

Air Tour Curfews

Visitors to the Grand Canyon are likely to be more annoyed by aircraft noise during certain times of the day than at other times of the day. The FAA established air tour curfews in 61 FR 69302 to address this problem. In the summer season, air

tours may not operate in the Dragon and Zuni Point corridors between the hours of 6 pm and 8 am; in the winter, the curfew is between 5 pm and 9 am. In future rulemakings, this curfew may be expanded to the rest of the Grand Canyon or the curfew hours may be expanded.

Limits on the Number of Aircraft That Can Be Used

On December 31, 1996, the FAA issued a final rule (61 FR 69302) which placed a cap on the number of "commercial sightseeing" aircraft that could operate in the SFAR. The FAA is revising this final rule to limit the number of air tours instead of aircraft because it was determined the aircraft cap was not an adequate limit on growth.

Limits on the Number of Air Tour Operations

Capping the number of flights allowed in the GCNP is another approach for limited aircraft noise that may be permitted in the park. This approach is being adopted by the FAA with this particular rulemaking. This final rule temporarily limits all commercial air tours in the GCNP SFRA on a calendar year basis so that such air tours conducted by certificate holders in the SFRA do not exceed the amount of air tours reported in accordance with current § 93.317.

Expansion of Flight Free Zones

Another approach that the FAA uses to control aircraft noise in the Grand Canyon is to establish Flight Free Zones. Aircraft, under this alternative, would be forbidden from flying over certain parts of the GCNP. This highly restrictive alternative is designed to protect certain areas from any noise emanating from aircraft overhead. SFAR 50-2 established four flight-free zones from the surface to 14,499 feet mean sea level.

On December 31, 1996, the FAA established a new FFZ, merged to existing FFZs, and expanded the other two FFZs.

Phase Out of Noisy Aircraft

An approach that the FAA is currently considering is mandating that noisy aircraft be phased out of service over the Grand Canyon. The FAA proposed such an action by issuing an NPRM on December 31, 1996 to phase out noisy aircraft by 2008. This could be a very expensive rulemaking; costs were estimated at $ 173 million (undiscounted) in the 1996 NPRM. All these costs would have to be borne by 25 small operators. The FAA has delayed issuing a final rule in order to consider other less costly actions. However, the FAA may choose to issue a final rule on this action in the future.

Encourage the Use of Quiet Aircraft

This recommendation would require aircraft used in GCNP to meet a yet to be defined standard to be considered quiet technology. As stated in the December 1996 final rule on Special Flight Rules in the Vicinity of Grand Canton National Park, quieter aircraft technology incentives are viewed as another approach to substantially restore natural quiet to the Grand Canyon while maintaining a viable tour industry.

Establishment of Aircraft Noise Budgets

An approach that the FAA has not yet adopted, but which is under consideration is the noise budget. In this alternative, the FAA would consider letting the market place allow the aircraft owners to determine which airplanes to fly by rationing the amount of noise that any tour operator could emit. Each tour operator would be allotted a specific amount of noise "credits" to be spent over a specific period of time, such as a day, week, or month. These credits would be allocated based

on a formula that takes into account the number of tours, and the number and type of aircraft that they had in the base year. Each aircraft type would be assigned a rating based on how noisy it was when compared to a certain decibel level; the noisier the aircraft, the higher its rating. When an operator flew any particular aircraft on its tour, it would use up this numerical rating against the number of noise credits that it had been allocated.

Tour operators could increase their number of tours in two basic ways. They could purchase credits from other operators, thus allowing more tours and/or noisier aircraft. Alternatively, they could invest in quieter aircraft, thus allowing them to fly more tours. Of course, operators could do both, which would certainly increase their number of flights.

A variation on this alternative would be to assign specific routes or specific times of day with positive and negative bonus "points". These points could either add to or subtract from the aircraft's rating as incentive for operators to fly or not to fly certain routes or at certain times of the day. Thus, an operator who chose the "negative points" routes and/or times of the day would be rewarded by being able to fly more tours. On the other hand, since some of the "positive point" routes and/or times of the day might be the more lucrative ones (where and when everyone would want to fly), operators would also be free to try to maximize profits by fling these.

While the FAA has not currently adopted this alternative, the FAA may consider adopting this alternative or elements of this alternative in the future.

Time of Week Restriction

Another alternative not yet under active consideration would be to restrict tours to specific days during the week. This

way, certain parts of the Park or the entire Park could be noise free for entire days. This approach might be used during the October "oars only rafting period." A variation would be to combine this alternative with time of day restrictions. Hence, a certain corridor could, for example, be off-limits for tours for 2 mornings and 3 afternoons during the week.

Another variation would be to give the tour operators a number of day-of-the-week "credits" and allow the tour operators to bid on which days they would want to fly each corridor and how many tours would be flown on each of the days when tours would be allowed. This variation would allow operators to maximize profits given the constraint of days of the week when tours would not be allowed.

It should be noted that these and, possibly additional alternative, may be considered in the context of efforts to encourage the use of quiet technology. Where possible, the FAA will seek to implement options that will lower air tour operators' overall costs while promoting the goal of substantial restoration of natural quiet.

Affordability Analysis

For the purpose of this RFA, an affordability analysis is an assessment of the ability of small entities to meet costs imposed by the final rule. These are two types of costs imposed by the rule: (1) out-of-pocket costs (actual expenditures) associated with applications and documentation and (2) loss of potential future operating revenue associated with an increase in the level above current levels. This latter burden may be significant to financial viability because companies depend on growth in operating revenue to provide necessary cash to meet long-term obligations such as equipment purchase loans. A company's short-run financial strength is substantially influenced, among other things, by its liquidity (working capital position and its

ability to pay short-term liabilities). Unfortunately, most of the data to analyze this are not available.

There is an alternative perspective to the assessment of affordability, which pertains to the size of the annualized costs of the rule relative to annual revenues. The lower the relative importance of those costs, the greater the likelihood of implementing either offsetting cost saving efficiencies or raising fares to cover increased costs without substantially decreasing passengers.

This analysis assesses affordability by examining the annualized cost of compliance relative to an estimate of total Grand Canyon commercial air tour operating revenues for each of the small entities. The annualized change in net operating revenues corresponds to foregoing the anticipated 3.3 percent per year growth of undiscounted net operating revenues. This number is relatively constant across all air tour operators because the majority of the negative impact (lost revenues) imposed by this rulemaking is directly related to the number of air tours that are being conducted. For these operators, there may be some prospect of absorbing the cost of the rule through fare increases.

It appears that given the current state of the industry, changes in net operating revenues might be offset by increased airfares. The limit on air tours will restrict the future supply of Grand Canyon air tours while demand for air tours is expected to increase, which might make it easier for affected entities to increase prices. No clear conclusion can be drawn with regard to the abilities of small entities to afford the reductions in net operating revenues that will be imposed by this final rule because the FAA is not able to estimate the amount of revenue increase obtained through price increases.

Disproportionality Analysis

The FAA does not believe any of the 25 entities will be disadvantaged relative to larger operators because within the context of the RFA, all Grand Canyon commercial air tour operators are small regardless of their size relative to one another.

Competitiveness Analysis

All air tour operators currently operating in GCNP are small entities. All these operators will be proportionately impacted by the commercial air tour limitation provision of this rulemaking (the commercial air tour limitation has the greatest impact of all provisions of this rulemaking). The smaller operators will not be put at a disadvantage relative to the largest operators as a result of this provision.

Except for air tours to and from Grand Canyon West Airport, this rulemaking contains one feature impacting competitiveness. The commercial air tour limitation will protect established operators from competition from new entrants or form newly established operators who are just getting set up and therefore provide only a limited number of air tours. In this instance, the commercial air tour limitation puts new entrants and newly established operators at a disadvantage to the established operators because that provision will limit the number of air tours they can provide to only those allocation that they can obtain through transfer.

Business Closure Analysis

The FAA is unable to determine with certainty the extent to which the final rule will cause small entities to close their operations. However, the limited profit and loss data that the FAA has and the affordability analysis can be an indicator in

business closures. In 1997 and 1998, of the data that the FAA has for 6 air tour operators, two of these air tour operators experienced losses in both years.

In determining whether or not any of the 25 small entities will close business as the result of compliance with this rule, one question must be answered: "Will the cost of compliance be so great as to impair an entity's ability to remain in business?" The FAA has incomplete information on which or how many of these small entities are already in serious financial difficulty and the limited number of commenters who supplied information to the docket did not elaborate on this. However, this rule can have a significant impact on those small entities that re already experiencing financial difficulty. This rulemaking can prevent them from escaping their financial difficulties through increased revenues from an increase in future commercial air tours. To what extent the proposed rule makes the difference in whether these entitles remain in business is difficult to answer.

Summary of Benefits and Costs

Public Law 100-91 was adopted to substantially restore natural quiet and experience in GCNP. The primary intended benefit of this rule is its contribution toward restoring natural quiet and experience in GCNP. The FAA estimates that this rule, together with its two associated actions of route adjustments, will restore natural quiet to about 41 percent of the park. The estimated 10-year use benefits (benefits derived from hiking, rafting, or sightseeing) as a result of this rule and the associated actions will be about $ 39.8 million, discounted as 7 percent over 10 years. This rule, without the associated actions, will provide a discounted "use" benefit to ground visitors of about $ 20.4 million over the same period. The FAA does not have adequate data to estimate the non-use benefits of aircraft

noise reduction at GCNP, but believes this rulemaking may generate significant non-use benefits.

The estimated 10-year cost of these regulations will be $ 155.4 million ($ 100.3 million, discounted). The majority of the costs of these regulations will be $ 154.3 million ($ 98.6 million, discounted) due to the imposition of air tour operations limits. After two years, this requirement may be reviewed and subject to change. At the end of the two years review, the cost in lost revenue will be $ 13.2 million ($ 11.9 million, discounted). The status of the quiet technology rulemaking and the Comprehensive Aircraft Noise Management plan will also be taken into consideration at that time. The estimated 10-year cost of the other provisions to air tour operators is $ 30,000, or $ 23,000, discounted. FAA costs are estimated at $ 1.06 million or $ 746,400 discounted.

International Trade Impact Assessment

The FAA has determined that the rulemaking will not affect non-U.S. operators of foreign aircraft operating outside the United States nor will affect U.S. trade. It can, however, have an impact on commercial air tour business at GCNP, much of which is foreign.

The United States Air Tour Association estimated that 60 percent of all commercial air tourists in the United States are foreign nationals. The Las Vegas FSDO and some operators, however, believe this estimate to be considerably higher at the Grand Canyon, perhaps as high as 90 percent. To the extent the air tour limitation rulemaking disrupts the marketing of Grand Canyon air tours to foreign visitors and thereby reduces their patronage of these tour, the commercial air tour industry can potentially experience an additional loss of revenue beyond what is expected as a result of the cap.

The FAA cannot put a dollar value on the portion of the potential loss in commercial air tour revenue associated with a weakening in foreign demand for U.S. services concomitant with the limitation on commercial air tours of the Grand Canyon.

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (the Act), enacted as Public Law 104-4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure of $ 100 million or more (when adjusted annually for inflation) in any one year by State, local, and tribal governments in the aggregate, or by the private sector. Section 204(a) of the Act, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a "significant intergovernmental mandate." A "significant intergovernmental mandate" under the Act is any provision in a Federal agency regulation that will impose an enforceable duty upon State, local, and tribal governments in the aggregate of $ 100 million (adjusted annually for inflation) in any one year. Section 203 of the Act, 2 U.S.C. 1533, which supplements section 204(a), provides that, before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan, which, among other things, must provide for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity for these small governments to provide input in the development of regulatory proposals.

This final rule does not contain any Federal intergovernmental or private sector mandates. Therefore, the

requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

Federalism Implications

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. The FAA determined that this action does not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the FAA has determined that this final rule does not have federalism implications.

Environmental Review

The FAA has prepared a Final Supplemental Environmental Assessment (FSEA) for this final rule to ensure conformance with the National Environmental Policy Act of 1969. Copies of the FSEA will be circulated to interested parties and a copy has been placed in the docket, where it will be available for review.

Energy Impact

The energy impact of the notice has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Public Law 94-163, as amended (43 U.S.C. 6362) and FAA Order 1053.1. It has been determined that the final rule is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 14 CFR Part 93

Air traffic control, Airports, Navigation (Air), Reporting and Recordkeeping requirements.

The Amendment

For the reasons set forth above, the Federal Aviation Administration amends part 93, in chapter I of title 14, Code of Federal Regulations, as follows:

PART 93—SPECIAL AIR TRAFFIC RULES AND AIRPORT TRAFFIC PATTERNS

1. The authority citation for part 93 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40109, 40113, 44502, 44514, 44701, 44719, 46301.

2. Section 93.303 is revised to read as follows:

§ 93.303—Definitions.

For the purposes of this subpart:

Allocation means authorization to conduct a commercial air tour in the Grand Canyon National Park (GCNP) Special Flight Rules Area (SFRA).

Commercial air tour means any flight conducted for compensation or hire in a powered aircraft where a purpose of the flight is sightseeing. If the operator of a flight asserts that the flight is not a commercial air tour, factors that can be considered by the Administrator in making a determination of whether the flight is a commercial air tour include, but are not limited to—

(1) Whether there was a holding out to the public of willingness to conduct a sightseeing flight for compensation or hire;

(2) Whether a narrative was provided that referred to areas or points of interest on the surface;

(3) The area of operation;

(4) The frequency of flights;

(5) The route of flight;

(6) The inclusion of sightseeing flights as part of any travel arrangement package; or

(7) Whether the flight in question would or would not have been canceled based on poor visibility of the surface.

Commercial Special Flight Rules Area Operation means any portion of any flight within the Grand Canyon National Park Special Flight Rules Area that is conducted by a certificate holder that has operations specifications authorizing flights within the Grand Canyon National Park Special Flight Rules Area. This term does not include operations conducted under an FAA Form 7711-1, Certificate of Waiver or Authorization. The types of flights covered by this definition are set forth in the "Las Vegas Flight Standards District Office Grand Canyon National Park Special Flight Rules Area Procedures Manual" which is available from the Las Vegas Flight Standards District Office.

Flight Standards District Office means the FAA Flight Standards District Office with jurisdiction for the geographical area containing the Grand Canyon.

Park means Grand Canyon National Park.

Special Flight Rules Area means the Grand Canyon National Park Special Flight Rules Area.

3. Section 93.315 is revised to read as follows:

§ 93.315 Requirements for commercial Special Flight Rules Area operations.

Each person conducting commercial Special Flight Rules Area operations must be certificated in accordance with Part 119 for Part 135 or 121 operations and hold appropriate Grand Canyon National Park Special Flight Rules Area operations specifications.

§ 93.316 [Removed and Reserved]

4. Section 93.316 is removed and reserved.

5. Section 93.317 is revised to read as follows:

§ 93.317 Commercial Special Flight Rules Area operation curfew.

Unless otherwise authorized by the Flight Standards District Office, no person may conduct a commercial Special Flight Rules Area operation in the Dragon and Zuni Point corridors during the following flight-free periods:

(a) Summer season (May 1-September 30)-6 p.m. to 8 a.m. daily; and

(b) Winter season (October 1-April 30)-5 p.m. to 9 a.m. daily.

6. Section 93.319 is added to read as follows:

§ 93.319 Commercial air tour limitations.

(a) Unless excepted under paragraph (f) or (g) of this section, no certificate holder certificated in accordance with part 119 for part 121 or 135 operations may conduct more commercial air tours in the Grand Canyon National Park in any calendar year than the number of allocations specified on the certificate holder's operations specifications.

(b) The Administrator determines the number of initial allocations for each certificate holder based on the total number of commercial air tours conducted by the certificate holder and reported to the FAA during the period beginning on May 1, 1997 and ending on April 30, 1998, unless excepted under paragraph (g).

(c) Certificate holders who conducted commercial air tours during the base year and reported them to the FAA receive an initial allocation.

(d) A certificate holder must use one allocation for each flight that is a commercial air tour, unless excepted under paragraph (f) or (g) of this section.

(e) Each certificate holder's operation specifications will identify the following information, as applicable:

(1) Total SFRA allocations; and

(2) Dragon corridor and Zuni Point corridor allocations.

(f) Certificate holders satisfying the requirements of § 93.315 of this subpart are not required to use a commercial air tour allocation for each commercial air tour flight in the GCNP SFRA provided the following conditions are satisfied:

(1) The certificate holder conducts its operations in conformance with the routes and airspace authorizations as specified in its Grand Canyon National Park Special Flight Rules Area operations specifications;

(2) The certificate holder must have executed a written contract with the Hualapai Indian Nation which grants the certificate holder a trespass permit and specifies the maximum number of flights to be permitted to land at Grand Canyon West Airport and at other sites located in the vicinity of that airport and operates in compliance with that contract; and

(3) The certificate holder must have a valid operations specification that authorizes the certificate holder to conduct the operations specified in the contract with the Hualapai Indian Nation and specifically approves the number of operations that may transit the Grand Canyon National Park Special Flight Rules Area under this exception.

(g) Certificate holders conducting commercial air tours at or above 14,500 feet MSL but below 18,000 feet MSL who did not receive initial allocations in 1999 because they were not required to report during the base year may operate without an allocation when conducting air tours at those altitudes. Certificate holders conducting commercial air tours in the area affected by the eastward shift of the SFRA who did not receive initial allocations in 1999 because they were not required to report during the base year may continue to operate on the specified routes without an allocation in the area bounded by longitude line 111 degrees 42 minutes east and longitude line 111 degrees 36 minutes east. This exception does not include operation in the Zuni Point corridor.

7. Section 93.321 is added to read as follows:

§ 93.321 Transfer and termination of allocations.

(a) Allocations are not a property interest; they are an operating privilege subject to absolute FAA control.

(b) Allocations are subject to the following conditions:

(1) The Administrator will re-authorize and re-distribute allocations no earlier than two years from the effective date of this rule.

(2) Allocations that are held by the FAA at the time of reallocation may be distributed among remaining certificate holders, proportionate to the size of each certificate holder's allocation.

(3) The aggregate SFRA allocations will not exceed the number of operations reported to the FAA for the base year beginning on May 1, 1997 and ending on April 30, 1998, except as adjusted to incorporate operations occurring for the base year of April 1, 2000 and ending on March 31, 2001, that operate at or above 14,500 feet MSL and below 18,000 feet MSL and operations in the area affected by the eastward shift of the SFRA bounded by longitude line 111 degrees 42 minutes east to longitude 111 degrees 36 minutes east.

(4) Allocations may be transferred among Part 135 or Part 121 certificate holders, subject to all of the following:

(i) Such transactions are subject to all other applicable requirements of this chapter.

(ii) Allocations authorizing commercial air tours outside the Dragon and Zuni Point corridors may not be transferred into the Dragon and Zuni Point corridors. Allocations authorizing commercial air tours within the Dragon and Zuni Point

corridors may be transferred outside of the Dragon and Zuni Point corridors.

(iii) A certificate holder must notify in writing the Las Vegas Flight Standards District Office within 10 calendar days of a transfer of allocations. This notification must identify the parties involved, the type of transfer (permanent or temporary) and the number of allocations transferred. Permanent transfers are not effective until the Flight Standards District Office reissues the operations specifications reflecting the transfer. Temporary transfers are effective upon notification.

(5) An allocation will revert to the FAA upon voluntary cessation of commercial air tours within the SFRA for any consecutive 180-day period unless the certificate holder notifies the FSDO in writing, prior to the expiration of the 180-day time period, of the following: the reason why the certificate holder has not conducted any commercial air tours during the consecutive 180-day period; and the date the certificate holder intends on resuming commercial air tours operations. The FSDO will notify the certificate holder of any extension to the consecutive 180-days. A certificate holder may be granted one extension.

(6) The FAA retains the right to re-distribute, reduce, or revoke allocations based on:

(i) Efficiency of airspace;
(ii) Voluntary surrender of allocations;
(iii) Involuntary cessation of operations; and
(iv) Aviation safety.

8. Section 93.323 is added to read as follows:

§ 93.323 Flight plans.

Each certificate holder conducting a commercial SFRA operation must file a visual flight rules (VFR) flight plan in accordance with § 91.153. This section does not apply to operations conducted in accordance with § 93.309(g). The flight plan must be on file with a FAA Flight Service Station prior to each flight. Each VFR flight plan must identify the purpose of the flight in the "remarks" section according to one of the types set forth in the "Las Vegas Flight Standards District Office Grand Canyon National Park Special Flight Rules Area Procedures Manual" which is available from the Las Vegas Flight Standards District Office.

9. Section 93.325 is added to read as follows:

§ 93.325 Quarterly reporting.

(a) Each certificate holder must submit in writing, within 30 days of the end of each calendar quarter, the total number of commercial SFRA operations conducted for that quarter. Quarterly reports must be filed with the Las Vegas Flight Standards District Office.

(b) Each quarterly report must contain the following information.

(1) Make and model of aircraft;

(2) Identification number (registration number) for each aircraft;

(3) Departure airport for each segment flown;

(4) Departure date and actual Universal Coordinated Time, as applicable for each segment flown;

(5) Type of operation; and

(6) Route(s) flown.

Issued in Washington, DC, on March 28, 2000.

Jane F. Garvey,
Administrator.

[FR Doc. 00-7949 Filed 3-28-00; 4:59 pm]

Appendix G-1

65 FR 33751

FEDERAL REGISTER

Vol. 65, No. 102

Rules and Regulations

DEPARTMENT OF TRANSPORTATION (DOT)

Federal Aviation Administration (FAA)

14 CFR Parts 91, 93, 121 and 135

[Docket No. FAA-1999-5926; Amendment Nos. 91-263, 93-80, 121-274 and 135-75]

RIN 2120-AG74

Modification of the Dimensions of the Grand Canyon National Park Special Flight Rules Area and Flight Free Zones; Correction

65 FR 33751

DATE: Thursday, May 25, 2000

ACTION: Final rule; correction.

SUMMARY: This document contains a correction to the final rule, published in the Federal Register on April 4, 2000 (65 FR 17736). That final rule amends special operating rules and airspace for those persons operating aircraft in the area designated as the Grand Canyon National Park Special Flight Rules Area (SFRA). That rule assists the National Park Service

in fulfilling the statutory mandate of substantial restoration of the natural quiet and experience of the park.

DATES: This correction is effective December 1, 2000.

FOR FURTHER INFORMATION CONTACT:
Kevin C. Willis, (202) 267-8741.

Correction of Publication

In final rule FR Doc. 00-7950, beginning on page 17736 in the **Federal Register** issue of April 4, 2000, make the following correction:

1. On page 17736, in column 1, in the heading section, beginning on line 4, correct "Amendment No. 93-80" to read "Amendment Nos. 91-263, 93-80, 121-274 and 135-75".

Issued in Washington, DC on May 15, 2000.

Donald P. Byrne,

Assistant Chief Counsel, Regulations Division.

[FR Doc. 00-12819 Filed 5-24-00; 8:45 am]

Supreme Court, U.S.
FILED
FEB 18 2003
CLERK

No. 02-931

In the
Supreme Court of the United States

AIRSTAR HELICOPTERS, INC.,
Petitioner,
v.
FEDERAL AVIATION ADMINISTRATION; JANE F. GARVEY, Administrator of the Federal Aviation Administration; UNITED STATES DEPARTMENT OF TRANSPORTATION; NORMAN Y. MINETA, Secretary of the United States Department of Transportation; NATIONAL PARK SERVICE; ROBERT L. ARNBERGER, Superintendent of the Grand Canyon National Park; FRAN P. MAINELLA, Director of the National Park Service; UNITED STATES DEPARTMENT OF THE INTERIOR; GALE A. NORTON, Secretary of the United States Department of the Interior; THE UNITED STATES OF AMERICA; and HUALAPAI INDIAN TRIBE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR HUALAPAI INDIAN TRIBE

GLENN M. FELDMAN
Counsel of Record
MARISCAL WEEKS McINTYRE & FRIEDLANDER, P.A.
2901 N. Central Avenue, Suite 200
Phoenix, Arizona 85012
(602) 285-5138
Attorneys for Hualapai Indian Tribe

23 pp

QUESTIONS PRESENTED

1. Whether *Morton v. Mancari*, 417 U.S. 535 (1974) and its progeny, which have clearly and consistently distinguished Indian tribal preferences from racial classifications, were overruled *sub silentio* by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), which involved racial classifications and which did not involve or mention Indian tribes.

2. Whether the Federal Aviation Administration and the National Park Service acted lawfully by adopting a regulation exempting air tour flights to and from the Hualapai Indian Reservation from a numerical limit on such flights in order to fulfill the federal government's trust obligation to protect the economic security of the Hualapai Indian Tribe.

PARTIES TO THE PROCEEDING

The Hualapai Indian Tribe was a defendant-intervenor in the court below and is a respondent here. The caption of the petition for writ of certiorari failed to name the Tribe as a respondent. The caption of this brief in opposition includes the Hualapai Indian Tribe as a named respondent.

The Hualapai Indian Tribe is a federally recognized tribal government that occupies the Hualapai Indian Reservation adjacent to Grand Canyon National Park in Arizona.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. PETITIONER IS NOT INJURED, IN CONSTITUTIONAL OR PRACTICAL TERMS, BY OPERATION OF THE HUALAPAI EXEMPTION 3

II. THE DECISION BELOW IS CONSISTENT WITH WELL-ESTABLISHED LAW 5

III. THE REGULATION WAS PROPERLY ADOPTED IN ORDER TO FULFILL THE GOVERNMENT'S TRUST OBLIGATION TO THE HUALAPAI TRIBE 9

IV. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE NINTH CIRCUIT'S DECISION IN *WILLIAMS v. BABBITT* 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 3,7,8,9

Alaska Chapter, Associated General Contractors of America v. Pierce,
694 F.2d 1162 (9th Cir. 1982) 14

American Greyhound Racing, Inc. v. Hull
146 F. Supp. 2d 1012 (D. Az. 2001) 9,14

Artichoke Joe's v. Norton,
216 F. Supp. 2d 1084 (E.D. Cal. 2002) 8,9

California v. Cabazon Band of Mission Indians,
480 U. S. 202 (1987) 12

Delaware Tribal Business Committee v. Weeks,
430 U.S. 73 (1977) 7

Department of the Interior v. Klamath Water Users Protective Association,
532 U.S. 1 (2002) 10

Flynt v. California Gambling Control Commission,
129 Cal. Rptr. 2d 167 (Cal. App. 1 Dist. 2002) 8,14

Fullilove v. Klutznick,
448 U.S. 448 (1980) 7

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 4

Metro Broadcasting, Inc. v. FCC,
497 U.S. 547 (1990) 7,8

Minnesota v. United States,
305 U.S. 382 (1939) 10

Moe v. Confederated Salish and Kootenai Tribes,
425 U.S. 463 (1976) 7

Montana v. Shook,
313 Mont. 314, ___ P.2d ___ (Mont. 2002) 8

Morton v. Mancari,
417 U.S. 535 (1974) ..... passim

Navajo Tribe of Indians v. United States,
224 Ct. Cl. 171, 624 F.2d 981 (1980) 10,11

New Mexico v. Mescalero Apache Tribe,
462 U.S. 324 (1983) 11,12

Northeastern Florida Chapter, Associated General Contractors of America v. City of Jacksonville,
508 U.S. 656 (1993) 4

Rice v. Cayetano,
528 U.S. 495 (2000) 7,8,9

Seminole Nation v. United States.
316 U. S. 286 (1942) 10

United States v. Antelope,
430 U.S. 641 (1977) 6,7

United States v. Mason,
412 U.S. 391 (1973) 10

United States v. Mitchell,
463 U.S. 206 (1983) 10

Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979) 7

Washington v. Washington State Commercial Fishing Vessel Association, 443 U.S. 658 (1979) 6

White Mountain Apache Tribe v. Bracker, *448 U.S. 136 (1980)* 12

Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997) 13,14,15

Statutes and Regulations

National Parks Overflights Act, 16 U.S. C. § 1a-1, note Sec. 3 1

Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq* 12

Reindeer Act of 1937, 25 U.S.C. § 500 *et seq* 13,14

Indian Financing Act of 1974, as amended, 25 U.S.C. § 1451, *et seq* 12

Indian Gaming Regulatory Act of 1988, 25 U.S. C. § 2701 *et seq* 12

Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S. C. § 4301 *et seq* 12,13

14 C.F.R. § 93.319(f)(2) 1

Miscellaneous

Cohen, Felix, *Handbook of Federal Indian Law* 221 (1982) 10

Goldberg, Carole, *American Indians and "Preferential" Treatment*, 44 U.C.L.A. L. Rev. 943 (2002) 14

Executive Order No. 13084, 63 Fed. Reg. 27, 655 (May 19, 1998) 11

STATEMENT OF THE CASE

On April 4, 2000, the Federal Aviation Administration ("FAA") and the National Park Service ("NPS") issued a final rule entitled "Commercial Air Tour Limitations in the Grand Canyon National Park Special Flight Rules Area" (the "Limitation Rule"), 65 Fed. Reg. 17,708-17,733; Petitioner's Appendix F. The Limitations Rule implemented, in part, the National Parks Overflights Act, 16 U.S.C. § 1a-1, note Sec. 3; Petitioner's Exhibit B.

The Limitations Rule, among other things, limited the number of air tours in and over the Grand Canyon that commercial air tour operators could provide. At the same time, the Rule exempted from this limit all flights to and from the Hualapai Indian Reservation, provided that the air tour operator had entered into a written contract with the Hualapai Indian Tribe authorizing access to the Hualapai Indian Reservation for that purpose. 14 C.F.R. § 93.319(f)(2); Petitioner's Appendix at F-102 to 103. This provision is referred to herein as the "Hualapai exemption."

The agencies incorporated this exemption into the Limitations Rule after carefully evaluating the factual and legal record developed during the rulemaking process. The agencies consulted with ten different Indian tribes potentially affected by the proposed rule. Petitioner's Appendix at F-31. As a result of this process, the agencies determined that only the Hualapai Tribe's economy was largely based on tourism provided by air tour operations and that a significant number of tribal members were employed in tourism-related businesses. Petitioner's Appendix at F-28 to 29, F-31 to 32, F-44 to 45, F-74 to 75. The agencies concluded that the proposed rule "would

significantly adversely impact the Hualapai Tribe's economic development and self-sufficiency," *id.* at F-31, and that "the direct impact to the Tribe is more severe than initially believed." *Id.* at F-75.[1] As a result, the agencies determined that it was both necessary and appropriate to exempt air tours to and from the Hualapai Reservation in the final rule. They did so in order to comply with the federal government's unique but well-established trust responsibility to Indian tribes; an obligation that is intended to foster and protect tribal economic development and self-sufficiency. *Id.* at F-31 to 32, F-44. Accordingly, the final Limitations Rule included the Hualapai exemption.

Petitioner and several other air tour operators challenged this provision of the final rule, asserting equal protection and other theories. The court of appeals addressed and rejected those arguments in a footnote. Petitioner's Appendix at A-24, n. 8. It is this footnote that petitioner asks the Court to review in this proceeding.

SUMMARY OF ARGUMENT

For almost thirty years—since *Morton v. Mancari*, 417 U.S. 535 (1974)—this Court has carefully distinguished Indian tribal preferences from racial classifications. Special treatment for Indian tribes has been consistently upheld under the United States' unique trust relationship with tribal governments, and such preferences have been determined to be "political rather than racial in nature." *Id.* at 553, n. 24. The constitutionality

---

[1] The agencies also noted that that Hualapai Tribe does not operate a tribal casino, making the Tribe's reliance on tourism revenue even more critical. Petitioner's Appendix at F-28.

of these tribal preferences is determined under a "rational relationship" standard.

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court determined that a strict scrutiny standard was to be used in analyzing equal protection claims involving purely racial classifications. *Adarand* did not involve, or even mention, Indians or tribal preferences. The petition nevertheless asks this Court to hold that *Adarand* overruled *Mancari* and its progeny *sub silentio* and that Indian tribal preferences must now be analyzed under strict scrutiny.

The Court should deny the petition. The unique structure of the Hualapai preference at issue in this case benefits, rather than harms, petitioner. As a result, this case would not be an appropriate vehicle for an analysis of equal protection issues. In addition, the decision of the court below is consistent with the well-established law in this area and does not conflict with any decision of this Court or of any other court of appeals.

ARGUMENT

I. PETITIONER IS NOT INJURED, IN CONSTITUTIONAL OR PRACTICAL TERMS, BY OPERATION OF THE HUALAPAI EXEMPTION

As a threshold matter, it is not clear that petitioner has been harmed by operation of the Hualapai exemption in any manner that would warrant review by this Court.

Under the equal protection provision of the Fifth Amendment, one must be "deprived" of life, liberty or property in order to make out a colorable claim; that is, one must be

injured in some legally cognizable way by the challenged governmental action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In this case, and because of the unique structure of the Hualapai exemption, petitioner not only is not harmed, but actually benefits, from its existence.

The cases addressing racial classifications or affirmative action programs that this Court typically reviews invariably involve applicants competing for a finite resource, such as construction contracts, employment opportunities or educational admissions. The hallmark of these cases is that when Applicant A wins the contract, or the job, or the coveted admission to the university, Applicant B cannot receive that same benefit and is thereby injured by being deprived of the opportunity to complete for it on an equal footing. *Northeastern Florida Chapter, Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 667 (1993).

That is not the case here. The Hualapai exemption does not create a "zero sum game" in which one applicant wins because the other applicant loses. Rather, the Hualapai exemption actually increases the total number of air tour opportunities available to petitioner (as well as to all other air tour operators), by exempting from the Limitations Rule all flights to and from the Hualapai Reservation. This expanded universe of opportunities is available to all applicants. And, as petitioner candidly admitted in its application for an extension of time to file its petition in this proceeding, every other air tour company that was a plaintiff in the court below has now entered into a contract with the Hualapai Tribe and is enjoying the benefit of increased air tour opportunities offered by the Hualapai exemption.

The same benefit is equally available to petitioner, as there is no numerical limit on the number of flights that can be exempted under the Hualapai provision of the regulation. Conversely, if the Hualapai exemption were struck down, it would actually have the effect of limiting available flight opportunities for petitioner and the other air tour companies; a result that would harm both the companies and the Hualapai Tribe.

Given this rather unique regulatory structure, and the fact that petitioner is not actually injured by its operation, this case lacks the recurring importance that warrants the Court's review.

II. THE DECISION BELOW IS CONSISTENT WITH WELL-ESTABLISHED LAW

In *Morton v. Mancari*, 417 U.S. 535 (1974), the Court upheld a hiring preference for tribal Indians within the Bureau of Indian Affairs from a Fifth Amendment challenge. In doing so, the Court recognized the "unique legal status of Indian tribes under federal law," *id.* at 551; a trust relationship based upon the Constitution and imposing upon the United States fiduciary responsibilities to protect tribal interests. *Id.* at 551-52. This "special relationship" not only permitted Congress to enact legislation giving tribes certain preferences, but, in fact, as the Court readily acknowledged:

> [l]iterally every piece of legislation dealing with Indian tribes and reservations...single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were

> deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Id. at 552.

The Court then carefully distinguished tribal preferences from racial classifications:

> [t]he preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature.

Id. at 553, n. 24. The Court concluded by holding that laws affording Indian tribes and their members special treatment are constitutional as long as those laws "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians...." *Id.* at 555.

The basic principals discussed in *Mancari* have been carried forward by this Court (and lower courts) in an unbroken series of cases upholding the constitutionality of preferences of various kinds for Indian tribes. *See Washington v. Washington State Commercial Fishing Vessel Association*, 443 U.S. 658 (1979) (upholding distinction between tribal and non-tribal applicants for fishing permits); *United States v. Antelope*, 430

U.S. 641, 645-46 (1977) ("federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications"); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84-85 (1977); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 479-80 (1976). And in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), the Court summarized this line of authority by stating: "[i]t is settled that the unique legal status of Indians under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." *Id.* at 500-01 (internal quotations omitted).

Contrary to petitioner's contention, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), did not overrule *Mancari* and its progeny *sub silentio*. As the Court noted in *Adarand*, that case "concerns only classifications based explicitly on race, " *id.* at 213, and the majority opinion neither addressed nor even mentioned Indian tribes or the unique legal principals applicable to tribal preferences. *Adarand* held that federal racial classifications were to be reviewed under a strict scrutiny standard for equal protection purposes and expressly overruled two earlier cases – *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) – which had suggested that a lesser standard might be permissible for that purpose. What *Adarand* did not do, either expressly or impliedly, was overturn the unbroken line of authority from this Court that tribal preferences are political and not racial in nature. Indeed, in *Rice v. Cayetano*, 528 U.S. 495, 519-20 (2000), decided five years after *Adarand*, the Court cited and discussed *Mancari* and related cases with approval, noting that "as we have established in a series of cases, Congress may

fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." *Id.*

Petitioner also argues that the decision below conflicts with *Cayetano*. Petition at 12-14. But *Cayetano* offers petitioner little comfort. To the extent that it affirms the continuing validity of *Mancari* and its progeny, *Cayetano* undercuts petitioner's argument concerning the impact of *Adarand*. Moreover, the fact that *Cayetano* did not extend the *Mancari* analysis to native Hawaiians is based upon important factual distinctions: native Hawaiians do not have a federally-recognized tribal form of government or the constitutionally-based fiduciary relationship with the United States that characterize Indian tribes in the lower 48 states. As a result, *Cayetano* could decline to extend the *Mancari* analysis while remaining consistent with *Mancari* and its progeny, and with the decision of the court below.

Finally, petitioner contends that review by this Court is necessary because "a cloud of constitutional uncertainty" has been created in this area, Petition at 8, and that "[r]eviewing courts are struggling on what standard of review to apply." *Id.* at 11. In this regard, petitioner seriously overstates its case. In fact, every court to have considered the issue—including the court below and other recent federal and state decisions—have uniformly rejected petitioner's argument and have concluded that *Mancari* survived *Adarand* and that the rational relation standard is to be used in analyzing equal protection challenges to tribal preferences. *Montana v. Shook*, 313 Mont. 314, ____ P.2d ____ (Mont. 2002); *Flynt v. California Gambling Control Commission*, 129 Cal. Rptr. 2d 167 (Cal. App. 1 Dist., 2002); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084 (E.D. Cal.

2002); *American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d. 1012 (D. Az. 2001) *rev'd on other grounds*, 305 F.3d. 1015 (9th Circ. 2002).

As these recent decisions demonstrate, the law in this area continues to be well-settled and well-understood. Because the decision of the lower court is consistent with this body of law, and because it does not conflict with *Adarand, Cayetano* or any other decision of the Court, review is not warranted.

III. THE REGULATION WAS PROPERLY ADOPTED IN ORDER TO FULFILL THE GOVERNMENT'S TRUST OBLIGATION TO THE HUALAPAI TRIBE.

Petitioner further contends that the FAA and the NPS acted improperly by addressing the particular concerns of the Hualapai Tribe in the Limitations Rule without express statutory authorization. Petition, Questions Presented, Number 2. Petitioner is wrong.

The agencies promulgated the Hualapai exemption in furtherance of the United States' well-established fiduciary obligation to Indian tribes in general and the Hualapai Tribe in particular. After determining that the Limitations Rule as initially proposed would have "significantly adversely impact[ed]" the Hualapai Tribe and its tourist-based economy, the FAA promulgated the tribal exemption to fulfill "the federal trust responsibility [i]n the economic development and self-sufficiency of the tribe," Petitioner's Appendix at F-31, and because it was "necessary in order to fulfill the government's trust responsibility to the Hualapai Tribe." *Id.* F-44.

The existence of a "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people" *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942), is well established. *See United States v. Mason*, 412 U.S. 391, 398 (1973); *Minnesota v. United States*, 305 U.S. 382, 386 (1939). More recently, this Court has described the United States' trust obligation to Indian tribes as "one of the primary cornerstones of Indian law," *Department of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 11 (2002) (quoting with approval from F. Cohen, Handbook of Federal Indian Law 221 (1982), and as a "principal that has long dominated the Government's dealings with Indians." *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

Mitchell also makes clear that the federal government's obligation to fulfill this unique trust obligation to tribal governments does not require express statutory authorization. *Id.*, *citing Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980). In *Navajo*, the Court of Claims expressly rejected this contention, stating that:

> where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Id. In this case, the regulatory exemption applies to activities taking place on the Hualapai Indian Reservation, on lands held in trust for the Tribe by the United States. Thus, no statutory authority was required in order to support the agencies' promulgation of the Hualapai exemption.[2]

Even if statutory authority were required, there is ample authority to support the agencies' action in this case. As discussed above, at pages 1-2, the FAA and NPS adopted the Hualapai exemption in order to protect the Hualapai Tribe's unique tourist-based economic interests. Thus, this provision was enacted in furtherance of Congress' well-established policy of promoting tribal economic development and self-sufficiency; a policy grounded in numerous statutes and repeatedly recognized by this Court. For example, in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), the Court noted that:

> both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. We have stressed that Congress' objective of furthering tribal self-government . . . includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development."

---

[2] The regulation was also consistent with President Clinton's Executive Order of May 14, 1998, which directed federal agencies to acknowledge and incorporate the United States' "unique legal relationship with Indian tribal governments" in their rulemaking activities. Executive Order No. 13084, 63 Fed. Reg. 27, 655-27, 657 (May 19, 1998).

Id. at 334-35 (footnote and citations omitted); *see also, California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 and n. 19 (1987) ("These are important federal interests."); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 and n. 10 (1980). *Mescalero, Cabazon* and *White Mountain* all cited the Indian Financing Act of 1974, as amended, 25 U.S. C. § 1451, *et seq.* and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq*, as examples of federal statutes expressly promoting tribal self-sufficiency.

More recently, in the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 *et seq.*, Congress expressly stated that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency and strong tribal governments." *Id.* at § 2701 (4). Even more relevant in this context is the Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. § 4301 *et seq.* There, in its statement of findings and purpose, Congress noted that:

> (9) the United States has an obligation to assist Indian tribes with the creation of appropriate economic and political conditions with respect to Indian lands to:
>
> (A) encourage investment from outside sources that do not originate with the tribes; and
>
> (B) facilitate economic ventures with outside entities that are not tribal entities.

Id. at § 4391 (a)(9). It is precisely these types of contractual arrangements between tribes and non-Indian businesses that the Hualapai exemption was intended to promote. Petitioner's Appendix at F-102 to 103 (requiring tour operators to have a written contract with the Hualapai Tribe authorizing the use of Reservation lands in order to obtain benefit of the Hualapai exemption).

In summary, then, the agencies' promulgation of the Hualapai exemption was consistent with both the federal government's general fiduciary responsibility to Indian tribes and with Congress' express policy of promoting tribal economic development. As a result, this regulation raises no issue that merits this Court's attention.

IV. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE NINTH CIRCUIT'S DECISION IN *WILLIAMS v. BABBITT.*

Petitioner contends that the court below applied *Mancari's* "unique Indian interests" test in a manner that conflicts with the Ninth Circuit's majority decision in *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997). Petition at 15-17. In fact, however, when properly analyzed, *Williams* offers petitioner no support for this contention.

In *Williams*, the court was called upon to determine whether an administrative interpretation of the Reindeer Act of 1937, 25 U.S.C. § 500 *et seq.*, was correct. In that case, the Interior Board of Indian Appeals (IBIA) had interpreted the Act as barring non-Natives in Alaska from any involvement in the reindeer industry. Writing for the majority, Judge Kozinski

both acknowledged the continued validity of *Mancari* and its progeny and cataloged dozens of federal statutes providing preferences or special treatment for Indian tribes. *Williams*, 115 F.3d at 663-64 and n. 6. The unifying factor in these cases and statutes, according to Judge Kozinski, was that they all related to what he described as "uniquely Indian interests." *Id.* at 665. While the parameters of that concept are not defined with absolute clarity, see *Alaska Chapter, Associated General Contractors of America v. Pierce*, 694 F.2d 1162, 1166-68 (9th Cir. 1982), Judge Kozinski opined that they must generally relate to tribal lands, status, government or culture. *Williams*, at 664. Because the Reindeer Act "in no way relates to native land, tribal or communal status or culture," *id.*, and because the IBIA's interpretation of that Act constituted "a naked preference unrelated to unique Indian concerns," *id.*, Judge Kozinski reasoned that he could avoid the difficult constitutional questions created by those facts by interpreting the Reindeer Act as not barring non-Native participation. *Id.* at 666.[3]

In contrast, the Hualapai exemption was narrowly tailored to protect the interests of a single tribe after a rulemaking process that carefully weighed and analyzed those interests. See discussion above at pages 1-2. Therefore, even if Judge

---

3 Judge Kozinski's analysis has been the subject of some academic criticism. Carole Goldberg, *American Indians and "Preferential" Treatment*, 44 U.C.L.A. L. Rev. 943, 960 (2002). It has also been described as "provocative dicta," *Flynt v. California Gambling Control Commission*, 129 Cal. Rptr. 2d 167 (Cal. App. 1 Dist. 2002) and the majority opinion in *Williams* has been characterized as an "exploration of equal protection issues without ultimately resolving them." *American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1076 (D. Az. 2001) *rev'd on other grounds* 305 F.3d 1015 (9th Cir. 2002).

Kozinski's interpretation of the *Mancari* test were correct, the Hualapai exemption would meet that test. According to Judge Kozinski "[l]egislation that relates to Indian land, tribal status, self-government or culture passes *Mancari's* rational relation test...." *Id.* at 664. In this case, the administrative record demonstrates, and the court below found, that the Hualapai exemption was directly related to tribal lands, in that it exempts only "flights to and from the Hualapai Indian Reservation...." Petitioner's Appendix at A-24, n.8. Moreover, the exemption was specifically crafted to protect the governmental interests of the Hualapai Tribe. Petitioner's Appendix at F-28. These factual differences, then, distinguish the decision below from the majority's decision in *Williams*. Accordingly, there is no meaningful conflict between these cases that warrants the Court's review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

GLENN M. FELDMAN
Counsel of Record
MARISCAL WEEKS McINTYRE
& FRIEDLANDER, P.A.
2901 N. Central Avenue, Suite 200
Phoenix, Arizona 85012
(602) 285-5138

Attorneys for Hualapai Indian Tribe

February, 2003

Supreme Court, U.S.
FILED
MAR 21 2003
OFFICE OF THE CLERK

No. 02-931

In the Supreme Court of the United States

AIRSTAR HELICOPTERS, INC., PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
ANDREW C. MERGEN
RONALD M. SPRITZER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15 pp

QUESTIONS PRESENTED

The Federal Aviation Administration and the National Park Service issued a regulation pursuant to the Overflights Act, 16 U.S.C. 1a-1, that limits the number of air tours over the Grand Canyon National Park. The regulation creates an exception that allows air tour providers to conduct more air tours if they do so pursuant to a contract with the Hualapai Indian Tribe. The questions presented are:

1. Whether petitioner, a provider of air tours in the Grand Canyon National Park area, has standing to challenge the Hualapai Tribe exception.

2. Whether the Hualapi Tribe exception is subject to strict scrutiny or instead is constitutional if rationally tied to the federal government's special obligations to Indian Tribes.

3. Whether the Federal Aviation Administration and the National Park Service had authority to create the Hualapi Tribe exception absent express statutory authorization.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200 (1995)	4, 7
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	10
Delaware Tribal Bus. Comm. v. *Weeks*, 430 U.S. 73 (1977)	6
Fisher v. *District Court*, 424 U.S. 382 (1976)	7
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	4, 5
Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976)	6-7
Morton v. *Mancari*, 417 U.S. 535 (1974)	4, 5-6, 8, 9
Morton v. *Ruiz*, 415 U.S. 199 (1974)	9
Rice v. *Cayetano*, 528 U.S. 495 (2000)	7, 8
Seminole Nation v. *United States*, 316 U.S. 286 (1942)	9
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998)	5
United States v. *Antelope*, 430 U.S. 641 (1977)	6
United States v. *Mitchell*, 463 U.S. 206 (1983)	9
Washington v. *Fishing Vessel Ass'n*, 443 U.S. 658 (1979)	6
Washington v. *Yakima Indian Nation*, 439 U.S. 463 (1979)	6
Williams v. *Babbitt*, 115 F.3d 657 (9th Cir. 1997), cert. denied, 523 U.S. 1117 (1998)	10, 11

Constitution, statute and regulations:	Page
U.S. Const.:	
Art. III	4, 5
Amend. V	3, 5
Amend. XV	8
Airport and Airway Safety, Capacity, Noise Improvement, and International Transportation Act of 1992, Pub. L. No. 102-581, Tit. 1, § 134, 106 Stat. 4887 (16 U.S.C. 1a-1 note)	10
Overflights Act, Pub. L. No. 100-91, § 3, 101 Stat. 676 (16 U.S.C. 1a-1 note):	
§ 3(b)(1), 101 Stat. 676	1, 2
§ 3(b)(2), 101 Stat. 676	2
§ 3(c), 101 Stat. 677	10
14 C.F.R. 93.319(b)	2
14 C.F.R. 93.319(f)	2, 5
Miscellaneous:	
65 Fed. Reg. (2000):	
p. 17,708	2
p. 17,715	3
p. 17,718	2
pp. 17,718-17,719	2
p. 17,726	3, 5

In the Supreme Court of the United States

No. 02-931

AIRSTAR HELICOPTERS, INC., PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 298 F.3d 997.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2002. On November 6, 2002, the Chief Justice granted an extension of time within which to file a petition for a writ of certiorari to and including December 14, 2002. The petition was filed on December 13, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Overflights Act, Pub. L. No. 100-91, § 3(b)(1), 101 Stat. 676 (16 U.S.C. 1a-1 note), requires the Secretary

of the Interior to submit to the Administrator of the Federal Aviation Administration (FAA) recommendations "regarding actions necessary for the protection of resources in the Grand Canyon from adverse impacts associated with aircraft overflights." The Secretary's recommendations shall provide for the "substantial restoration of the natural quiet and * * * protection of public health and safety from adverse effects associated with aircraft overflight." *Ibid.* After receiving the Secretary's recommendations, the Administrator must prepare a "plan for the management of air traffic in the air space above the Grand Canyon." § 3(b)(2), 101 Stat. 676. The Administrator is required to "implement the recommendations of the Secretary without change unless the Administrator determines that implementing the recommendations would adversely affect aviation safety." *Ibid.*

Pursuant to authority conferred by the Overflights Act, the FAA and the National Park Service (NPS) issued a regulation that limits the number of commercial air tour operations that may occur in the area over the Grand Canyon National Park. 65 Fed. Reg. 17,708 (2000). Under the regulation, an air tour operator may not conduct more tours than it conducted between May 1, 1997 and April 30, 1998. *Id.* at 17,718; 14 C.F.R. 93.319(b). An exception to the regulation (the Hualapai Tribe exception), permits operators to conduct additional tours whey they contract with the Hualapai Tribe to use the Tribe's Grand Canyon West airport. 14 C.F.R. 93.319(f); see 65 Fed. Reg. at 17,718-17,719. The Hualapai Tribe is a federally recognized Indian Tribe.

The FAA and the NPS created the Hualapai Tribe exception in order to fulfill the government's trust responsibility to the Tribe. See 65 Fed. Reg. at 17,718. "The majority of the Reservation's inhabitants live

below the poverty level and unemployment was estimated in 1995 to range from 50-70 percent of the adult population." *Id.* at 17,726. Moreover, "[m]uch of the Tribal economy is based on tourism, and Grand Canyon West [Airport] has been identified by the Tribe as the primary means by which to address its high unemployment rate while preserving the Tribe's natural and cultural resources." *Ibid.* The Tribe collects at least $2.3 million annually from air tour operators. *Ibid.*

Because the Tribe relies so heavily on that source of revenue to support activities on the Reservation, the FAA concluded that limiting air tours that land at the Reservation would "significantly adversely impact the Hualapi Tribe's economic development and self-sufficiency," and threaten the Tribe's ability to maintain social services for its members. 65 Fed. Reg. at 17,715. The FAA explained that, "[b]ased upon the information provided by the Hualapai Tribe, approximately 45% of the Hualapai Tribe's global fund budget is derived from air tour operations at [Grand Canyon West]." *Ibid.* The FAA estimated that the Hualapai Tribe exception would reduce the economic loss to the Tribe by approximately $4.9 million during the period 2000-2009. *Id.* at 17,726.

The Hualapai Tribe exception also creates a substantial economic benefit for air tour providers. The FAA estimated that the Hualapai Tribe exception would reduce the cost of the overflight regulation to all air tour providers by $43.9 million over ten years. 65 Fed. Reg. at 17,726.

2. Petitioner and others filed a petition for review of the overflight regulation. They argued, *inter alia*, that Hualapai Tribe exception violates the equal protection component of the Fifth Amendment. The court of appeals rejected petitioner's challenges to the validity

of the regulation, including the challenge to the Hualapai Tribe exception. Pet. App. A1-A39. The court specifically rejected the contention that *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995), requires the exception to be analyzed under strict scrutiny. Pet. App. A24 n.8. The court concluded that under *Morton* v. *Mancari*, 417 U.S. 535 (1974), a federal law that gives special treatment to Tribes or their members is constitutional if rationally tied to the government's fulfillment of its trust obligation to the Tribes. Pet. App. A24 n.8. The court noted that "there is no dispute that the Hualapai exception is at least rationally related to 'the government's interest in fulfilling its trust obligation' to the Tribe." *Ibid.* (citation omitted). In response to the argument that *Adarand* implicitly overruled *Mancari*, the court of appeals stated that "lower courts do not have the power to make that determination." *Ibid.*

ARGUMENT

Petitioner lacks standing to challenge to the Hualapai Tribe exception. In any event, the court of appeals correctly ruled that the exception is constitutional because it is rationally tied to the federal government's trust obligation to the Tribe. That ruling does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

1. In *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), the Court held that a plaintiff must satisfy three elements in order to establish standing under Article III. First, the plaintiff must have suffered an injury in fact. *Id.* at 560. Second, there must be a causal connection between the injury and the conduct complained of, *i.e.*, the injury has to be fairly traceable to the chal-

lenged action of the defendant. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 560-561.

Petitioner cannot satisfy the first element of standing —injury in fact. The Hualapai Tribe exception does not make petitioner any worse off than it would be without the exception. To the contrary, the exception affords petitioner and other air tour operators the opportunity to conduct more air tours in the Grand Canyon area than they would be able to conduct without the exception. If an air tour provider enters into a contract with the Tribe and otherwise satisfies the requirements of 14 C.F.R. 93.319(f), the provider may conduct additional air tours without using its yearly allocation of air tours under the overflight regulation. Indeed, the FAA concluded that the economic value of the Hualapai Tribe exception to the air tour industry was nearly ten times greater than its economic value to the Tribe. See 65 Fed. Reg. at 17,726.

The government did not raise the standing issue below, and the court of appeals likewise did not address that issue in its decision. But since Article III standing is jurisdictional, it is properly raised here. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). Because petitioner does not suffer injury in fact from the operation of the Hualapai Tribe exception, it lacks Article III standing to challenge that exception. For that reason alone, the petition for a writ of certiorari should be denied.

2. In any event, petitioner's challenge to the Hualapai Tribe exception is without merit. Petitioner contends (Pet. 7-11) that the exception creates a racial classification that is subject to strict scrutiny under the equal protection component of the Fifth Amendment. That contention is foreclosed by *Morton* v. *Mancari*,

417 U.S. 535 (1974), and subsequent decisions applying the principles established in *Mancari*.

In *Mancari*, the Court squarely held that distinctions based on the United States' unique trust relationship with Indian Tribes should not be equated with distinctions based on race that are prohibited by the Constitution. In that case, the Court upheld the constitutionality of a law extending a preference for employment in the Bureau of Indian Affairs (BIA) to members of federally recognized Tribes who have "one-fourth or more degree Indian blood." 417 U.S. at 553 n.24. Although the classification had a racial component, the Court concluded that the Indian employment preference was not a "racial preference," because it was "granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 553-554. "In this sense," the Court held, "the preference [was] political rather than racial in nature." *Id.* at 553 n.24. More generally, the Court held that, "[a]s long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555.

Since *Mancari*, the Court has repeatedly reaffirmed that "federal regulation of Indian affairs is not based upon impermissible [racial] classifications." *United States* v. *Antelope*, 430 U.S. 641, 646 (1977). It is "governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial group consisting of Indians.'" *Ibid.* (citation omitted). See *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979); *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 85-90 (1977); *Moe* v. *Confederated*

Salish & Kootenai Tribes, 425 U.S. 463, 479-480 (1976); *Fisher* v. *District Court*, 424 U.S. 382, 390-391 (1976).

Under *Mancari* and subsequent decisions, the Hualapai exception is clearly constitutional. Indeed, the classification at issue here is even more clearly political in nature than the classification at issue in *Mancari*. In *Mancari*, the hiring preference applied to individual Indians who were members of federally recognized tribes. By contrast, the Hualapai Tribe exception applies to air tour providers, whether Indian or non-Indian, who are operating under contract with the Hualapai Tribe itself. Moreover, the exception applies only to tours that use the airport on the Tribe's Reservation, which the United States holds in trust for the Tribe. And as the preamble to the overflight regulation explains, the exception was created to assist the economic development of the Tribe and to help the Tribe to fulfill its governmental responsibilities to its people. There is therefore no question that the exception is rationally tied to the federal government's trust responsibility to the Tribe.

Petitioner contends that this Court's decision in *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995), implicitly overruled *Mancari*. But *Adarand* held only that strict scrutiny applies to racial classifications. *Id.* at 227. Nothing in *Adarand* purported to disturb the Court's holding in *Mancari* that federal laws like those at issue in *Mancari* rest on permissible political classifications, rather than impermissible racial classifications.

Moreover, in *Rice* v. *Cayetano*, 528 U.S. 495 (2000), a post-*Adarand* decision, the Court reaffirmed the *Mancari* line of cases. There, the Court explained that "[o]f course, as we have established in a series of cases, Congress may fulfill its treaty obligations and its

responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." *Id.* at 519 (citing cases). The Court reiterated *Mancari*'s observation that "every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians." *Ibid.* (quoting *Mancari*, 417 U.S. at 552). And it reaffirmed the holding in *Mancari* that the BIA preference was a constitutional political classification, rather than a suspect racial classification. *Id.* at 519-520. Applying the Fifteenth Amendment to the Constitution, the *Rice* Court refused to extend *Mancari* to "authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens." *Id.* at 520. But the Court left no doubt that under *Mancari* and other cases, Congress's authority to fulfill its trust responsibilities to Indian Tribes by enacting legislation for their benefit remains intact. *Id.* at 519-520. Petitioner's claim that *Adarand* implicitly overruled *Mancari* is therefore wholly without merit.

3. Petitioner next argues (Pet. 12-13) that the court of appeals' decision conflicts with *Mancari* and *Rice* because Congress did not expressly authorize the FAA and the NPS to create the Hualapai Tribe exception. But neither *Mancari* nor *Rice* held that federal agencies lack the authority to take into account the government's trust responsibility to Indian Tribes in carrying out their statutory responsibilities.

In support of its contrary view, petitioner relies (Pet. 12) on the statement in *Mancari*, 417 U.S. at 551, that the challenge in that case implicated the "plenary power of Congress * * * to legislate on behalf of federally recognized Indian tribes." Petitioner also relies on the statement in *Rice*, 528 U.S. at 520, that approval

of the preference at issue in that case would have extended *Mancari* to a "new and larger dimension." Neither of those statements suggests that an agency charged with carrying out statutory responsibilities may not take into account the government's trust responsibilities toward Indian Tribes, especially insofar as the agency's exercise of its regulatory authority would have a direct impact on the Tribe's Reservation.

Under this Court's decisions, the general trust responsibility applies to the federal government as a whole, not just Congress, and it therefore may properly be taken into account by federal agencies whose actions have a direct impact on a Tribe's Reservation. This Court has expressly stated that there exists "a general trust relationship between the United States and the Indian people." *United States* v. *Mitchell*, 463 U.S. 206, 225 (1983). In *Mitchell* the Court referred to "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Ibid.* (quoting *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942)). And it noted that "[t]his principle has long dominated the Government's dealings with Indians." *Ibid.* (citations omitted). Moreover, in the area of Indian affairs, "the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary [of the Interior] and his delegates at the BIA." *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974). See *Mancari*, 417 U.S. at 552.

Petitioner's contention that the Hualapai Tribe exception is invalid because it is not expressly authorized by Congress also conflicts with basic administrative law principles. Under those principles, an agency that has been delegated authority by Congress to carry out a statutory program is free to pursue any reasonable

policy choice unless Congress has spoken directly to the issue. *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-844 (1984). Because the Overflights Act does not speak directly to the question at issue here, the FAA and the NPS were free to ensure that their overflight regulation would not adversely affect the economic development and self sufficiency of the Hualapai Tribe. Indeed, Congress itself *mandated* an exception for certain helicopter flights from the North Run of the Grand Canyon to locations on the Hualapai Tribe Reservation, as selected by the Tribe, for the purpose of transporting individuals to or from boat trips on the Colorado River. See Overflights Act, § 3(c), 101 Stat. 677; see Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992, Pub. L. No. 102-581, Tit. 1, § 134, 106 Stat. 4887 (16 U.S.C. 1a-1 note) (directing Administrator of FAA, in consultation with, *inter alia*, "affected Indian tribes," to conduct a study and prepare a plan to manage increased air traffic over Grand Canyon National Park). In any event, the scope of the statutory authority of the FAA and NPS under the Overflights Act with respect to the Grand Canyon National Park presents no question of general importance warranting review by this Court.

4. Finally, petitioner errs in contending (Pet. 15-17) that the decision below conflicts with *Williams* v. *Babbitt*, 115 F.3d 657 (9th Cir. 1997), cert. denied, 523 U.S. 1117 (1998). In that case, the Ninth Circuit held that, under *Mancari* and other cases, legislation is rationally tied to the fulfillment of the government's trust responsibility to the Tribe when it "relates to Indian land, tribal status, self-government or culture." *Id.* at 664. The court further concluded that interpreting the Reindeer Industry Act of 1937 to give Alaska

natives a monopoly over reindeer herding throughout the State would raise a serious constitutional question under that standard. *Id.* at 664-666. The court therefore invalidated an administrative regulation that interpreted the Act to afford such a monopoly. *Id.* at 666.

There is no conflict between the decision below and *Williams*. First, it was undisputed below that the Hualapai Tribe exception is rationally tied to fulfilling the government's trust responsibility to the Tribe itself. Pet. App. A24 n.8. The D.C. Circuit therefore had no occasion to address whether the *Williams* formulation accurately captures the *Mancari* standard. In any event, the Hualapai Tribe exception satisfies the Ninth Circuit's standard: it is rationally related to "Indian land, tribal status, self-government or culture." 115 F.3d at 664. The exception applies to air tours conducted under contract with the Tribe; it is limited to flights that land on the Tribe's Reservation; it preserves the economic foundation of the Tribe's capacity for self government; and it gives non-Indians additional opportunities to conduct air tours.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
ANDREW C. MERGEN
RONALD M. SPRITZER
Attorneys

MARCH 2003

(A)

Supreme Court, U.S.
FILED
APR 1 2003
CLERK

No. 02-931

In the
Supreme Court of the United States

AIRSTAR HELICOPTERS, INC.,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION; *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

SHARON L. BROWNE
Counsel of Record
ANTHONY T. CASO
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

13 pp

QUESTIONS PRESENTED

The National Parks Overflights Act, 16 U.S.C. § 1a-1, was adopted for the purpose of protecting the resources of the Grand Canyon National Park from adverse impacts associated with aircraft overflights. In taking action to implement the Act, the Federal Aviation Administration and National Park Service limited the number of flights each air tour operator could fly over the Park. Although the Act was silent as to its applicability to Native Americans, the agencies nonetheless carved out an exemption for flights landing at and taking off from an airport operated by an Indian Tribe. The exemption was created for the sole purpose of providing a commercial advantage for members of the Indian Tribe. In light of the agencies' action in interpreting a congressional statute, the questions presented are as follows:

1. Whether federal agencies' interpretation of a statute that raises serious constitutional questions under the equal protection component of the Due Process Clause of the Fifth Amendment because it creates a racial classification exempting members of an Indian Tribe from its requirement should be subject to strict scrutiny review under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and not the rational basis test under *Morton v. Mancari*, 417 U.S. 535 (1974).

2. Whether federal agencies have the authority to carve out exemptions from environmental regulations to benefit members of Indian Tribes without specific authorization by Congress to do so.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. AIRSTAR HAS STANDING 1

II. FEDERAL AGENCIES DO NOT HAVE UNLIMITED AUTHORITY TO MAKE POLICY CHOICES 4

III. THE HUALAPAI EXCEPTION CANNOT BE SQUARED WITH THE CLEAR STATEMENTS IN *ADARAND CONSTRUCTORS, INC. v. PENA* 6

IV. THE HUALAPAI EXCEPTION CANNOT BE RECONCILED WITH THE "UNIQUE INDIAN INTERESTS" TEST IN *WILLIAMS v. BABBITT* 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 6-8

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 5

Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) 5

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 3-4

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 7

Morton v. Mancari, 417 U.S. 535 (1974) 6

Northeastern Florida Chapter, Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656 (1993) 1-2

Williams v. Babbitt, 115 F.3d 656 (9th Cir. 1997) 5, 8

Federal Statutes

49 U.S.C. § 46110(a) 3

REPLY BRIEF OF PETITIONER

AirStar Helicopters, Inc. (AirStar), respectfully files this reply to the Brief for the Federal Respondents in Opposition and Brief in Opposition for Hualapai Indian Tribe.

ARGUMENT

I

AIRSTAR HAS STANDING

AirStar has standing to challenge the Hualapai exception to the Limitation Rule under *Northeastern Florida Chapter, Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). In *Northeastern Florida*, this Court held that the "injury in fact" in an equal protection case "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* at 666. *Northeastern Florida* elaborates:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Id.

The Limitation Rule places severe restrictions on the commercial air tour business over Grand Canyon National Park. To remain in business, AirStar must compete under the Limitation Rule that severely limits the number of flights it can fly over the Park. Petitioner's Appendix (Pet. App.) at A-6, F-21. The Hualapai exception, however, grants a near monopoly

on permitted flights over the Park to the Tribe and those willing to pay the monopoly premium necessary to contract with the Tribe. Pet. App. at F-28, F-31 to F-32, F-102 to F-102. AirStar cannot compete on an equal basis for overflight rights because the Federal Aviation Administration (FAA) has already decided to grant unlimited overflight rights to the Hualapai and to limit the rights of everyone else. Pet. App. at F-43. This decision is based solely on the race of those who will gain economic benefit from this monopoly on overflight rights. Pet. App. at F-31. Under *Northeastern Florida*, AirStar has standing to challenge this discriminatory distribution of government permits. 508 U.S. at 666.

This injury is not cured by granting AirStar an opportunity to pay a monopoly premium to the Hualapai in order to regain the overflight rights denied by the Limitation Rule. *Cf.* Brief for the Federal Respondents at 5. The injury is the denial of the right to compete for overflight permits on an equal basis—a right not cured by forcing AirStar to pay the Hualapai a monopoly premium in order to continue in business.

In addition to the unequal competition, AirStar suffers injury from the federal agencies acting beyond their authority to grant a monopoly on overflight rights to the Hualapai Tribe. The Hualapai exception places AirStar at a competitive disadvantage. First, the Limitation Rule caps the number of flights AirStar can fly. Pet. App. at A-6, F-21. The financial injury AirStar will suffer under the Limitation Rule is well documented. AirStar, a small business, is unique among the 24 commercial operators that fly air tours at the Grand Canyon. Pet. App. at F-64, F-72, F-75 to F-76, F-96, Administrative Record (Adm. Rec.), Vol. 15 at 139; Vol. 16 at 162, 165. AirStar is the only commercial air tour operator that has a mixed fleet of both airplanes and helicopters. Adm. Rec., Vol. 15 at 139; Vol. 16 at 162, 165. It flies out of the Grand Canyon National Park Airport located at Tusayan, Arizona, and conducts tours over the eastern portion of the Grand Canyon.

Adm. Rec., Vol. 7, Operator Forecast at 79. *See also* http://www.airstar.com.

Under the Limitation Rule, AirStar will suffer a net operating loss for its airplanes of $27,259 in 2000, $64,211 in 2000-2001, $236,474 in 2000-2004, for a total loss from 2000-2009 of $749,449. Adm. Rec. Vol. 7, Operator Forecast at 79. AirStar will suffer similar losses for its helicopters of $103,439 in 2000, $243,657 in 2000-2001, $897,330 in 2000-2004, for a total loss from 2000-2009 of $2,843,878. *Id.* Whether measured under the "substantial interest" test of 49 U.S.C. § 46110(a) or the decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), AirStar has demonstrated injury in fact from the Limitation Rule.

The purpose of the Limitation Rule is to reduce the noise associated with aircraft overflights. As Federal Respondents readily concede, Congress charged them with the duty to take "actions necessary for the protection of resources in the Grand Canyon from adverse impacts associated with aircraft overflights." Brief for Federal Respondents at 2. By granting unlimited overflights to businesses contracting with the Hualapai owned airport, these agencies made the goal of noise reduction much more difficult to attain. This would explain the draconian nature of the Limitation Rule itself.[1] If AirStar is successful in having the Hualapai exception struck down, the

---

[1] Federal Respondents cannot argue that the Hualapai exception was granted without regard to the noise it would generate. The record contained studies of the noise attributed to the Hualapai-owned airport. Adm. Rec., Vol. 14, Review of Scientific Basis for Change in Noise Impact Assessment Method at 107; Vol.16, Comments from the Hualapai Tribe at 164; Vol. 16, Final Supplemental Environmental Assessment at 184. Further, failure to account for the noise generated by the exception would make the entire rule arbitrary—that is, the agencies would not know if the combination of the Limitation Rule and the Huapalai exception created more noise than without the rule.

agencies would be required to reconsider the Limitation Rule—without the noise created by the unlimited overflight granted in the exception. In such a case, AirStar will have the opportunity to argue for a Limitation Rule that will not have such a draconian effect on its operations. This is more than sufficient to establish standing to challenge authority of the Federal Respondents to grant the Hualapai exception. *See Lujan*, 504 U.S. at 560-61.

There can be no question that AirStar has suffered injury in fact that is fairly traceable to the challenged rule.

II

FEDERAL AGENCIES DO NOT HAVE UNLIMITED AUTHORITY TO MAKE POLICY CHOICES

In defending the Hualapai exemption, the Federal Respondents claim that federal agencies are free to regulate on ***any*** subject not specifically forbidden by Congress in the statute. According to Federal Respondents, because Congress did not speak directly to the question of providing an exception for flights landing at or taking off from the Hualapai airport, "the FAA and the National Park Service were free to ensure that their overflight regulation would not adversely affect the economic development and self sufficiency of the Hualapai Tribe." Brief for the Federal Respondents in Opposition at 10.[2]

Federal Respondents rely on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to make the remarkable statement that a federal agency "is free

---

[2] The Federal Respondents point out that the Overflight Act had expressly provided for certain limited Indian exemptions from the Overflight Act. Federal Respondents' Brief at 10. This shows that Congress had already determined the extent to which the Overflight Act could be exempted and by its silence declined to create further exemptions.

to pursue any reasonable policy choices unless Congress has spoken directly to the issue." Federal Brief at 9-10. This expansive view of federal agency authority is particularly troublesome because the Hualapai exemption is contrary to the policy choice made by Congress in adopting the Overflights Act. Congress intended to protect the resources of the Grand Canyon National Park from adverse impacts associated with aircraft overflights. Yet, the "policy choice" of the federal agencies grants the Hualapai Tribe near monopoly power in the sale of overflight rights as long as the flight takes off or lands at the Hualapai airport. Thus, the FAA's policy choice overrode the policy choice of Congress and, in effect, granted to the Indian Tribe monopoly power over flights in the Park.

Respondents' claim that federal agencies have independent policy making ability "unless Congress has spoken directly to the issue." This is at odds with the holding of *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986), that an agency "has no power to act . . . unless Congress confers power upon it." Petitioner cited this case in its petition, but Respondents did not address it.

A further conundrum is posed by Respondents' arguments when the agency's interpretation of a statute raises serious constitutional questions. In *Williams v. Babbitt*, 115 F.3d 656, 657 (9th Cir. 1997), the Ninth Circuit said that the agency's interpretation was permissible, but the court would not defer to it because such an interpretation raised serious constitutional questions. *Id.* at 661-62. In other words, the constitutional concerns trumped the *Chevron* doctrine. Yet, here, Respondents argue that as long as Congress is silent, a federal agency can make policy choices that raise grave constitutional

problems, and reviewing courts should simply defer to the agency without providing any scrutiny whatsoever.[3]

III

THE HUALAPAI EXCEPTION CANNOT BE SQUARED WITH THE CLEAR STATEMENTS IN *ADARAND CONSTRUCTORS, INC. v. PENA*

In their attempt to have *Morton v. Mancari*'s rational basis standard of review undisturbed and expanded to include any action taken by a federal agency involving Indian matters, Respondents assert that *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), did not throw *Mancari* into doubt. Federal Respondents' Brief at 7, Hualapai Brief at 7. Yet, *Adarand* was categorical; it stated that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." 515 U.S. at 227. This Court did not state that the standard applied to "all governmental action based on race, except for governmental action related to Indians or Indian Tribes." If a federal agency could avoid strict scrutiny by declaring that a scheme of classification, even though defined by degree of blood of a particular ancestry, was not a racial classification, then the protections of the Fifth and Fourteenth Amendments would be rendered meaningless.

Respondents fail to address Petitioner's argument that the decision of the lower court cannot be squared with the clear

---

[3] Respondents' troubling argument extends *Morton v. Mancari*, 417 U.S. 535 (1974), to mean that the FAA, and by inference all federal agencies, has the same "*sui generis*" relationship with Indian Tribes as the Bureau of Indian Affairs although the Respondents cannot cite to any congressional authority granting the FAA a "special relationship" or treaty power to deal with Indian Tribes. The cases and statutes cited in the Brief in Opposition for Hualapai Indian Tribe at 10-13 do not give federal agencies the authority to single out Indians for special treatment without authority from Congress.

statements in *Adarand*.[4] They argue that because this Court in *Adarand* overturned *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), and not *Mancari*, *Mancari*'s rational basis standard of review remains intact.

In *Adarand*, this Court noted that *Metro Broadcasting* undermined the three propositions established by the Court's earlier equal protection cases—congruence between the standards applicable to federal and state racial classifications; skepticism of all racial classifications; and consistency of treatment irrespective of the race of the burdened or benefitted group. *Adarand*, 515 U.S. at 226-27. This Court also noted that the three propositions undermined by *Metro Broadcasting* "all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons* not *groups*"; that, "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny" and that, "[t]o the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled." *Id.* at 227.

All of the three equal protection propositions enunciated by this Court in *Adarand* are similarly undermined by the standard of review applicable to federal legislation affording special treatment of Indians announced in *Mancari*. First, the formulation that all that need be shown is that the special treatment is tied rationally to Congress' unique obligation toward the Indians undermines the principle that the same equal protection standards apply to federal and state racial classifications. No state would be permitted to discriminate among its citizens on the basis of race in this way, unless the state was acting for the federal government under a delegation of its Indian Commerce Clause authority. Second, the *Mancari*

---

[4] Interestingly, the program struck down in *Adarand* considered American Indians as a race for preferential purposes, not constituents of a quasi-sovereign political entity. *Adarand*, 515 U.S. at 205.

formulation holds that "certain racial classifications ('benign [Indian]' ones) should be treated less skeptically than others" (*Adarand*, 515 U.S. at 227), thereby undermining the principle of skepticism. Third, the analysis in *Mancari* and its progeny undermine the principle of consistency because, "the race of the benefited group [Indians] is critical to the determination of which standard of review to apply." *Id.* In short, to the extent that *Mancari* held that a standard of review less than strict scrutiny is applicable to federal legislation affording special treatment to Indians, that case should be expressly overruled by this Court.

IV

THE HUALAPAI EXCEPTION CANNOT BE RECONCILED WITH THE "UNIQUE INDIAN INTERESTS" TEST IN *WILLIAMS v. BABBITT*

Federal Respondents attempt to reconcile the Hualapai exception with *Williams v. Babbitt*, 115 F.3d 657, by arguing that these flights are "conducted under contract with the Tribe, it is limited to flights that land on the Tribe's Reservation; it preserves the economic foundation of the Tribe's capacity for self government; and it gives non-Indians additional opportunities to conduct air tours." Federal Respondents' Brief, at 11. But exempting these flights from the Limitation Rule for the sole purpose of providing a commercial advantage of uninterrupted access to tourists and air tour operators does not meet the "unique Indian interests" test in *Williams*—these flights are not about Indian land, tribal status, self-government, or culture rooted in the "unique status of Indians." Instead, they are the result of a blatant racial classification aimed at assisting Indians economically. In *Williams*, the Ninth Circuit recognized the "grave" constitutional questions raised by the Interior Board of Indian Appeals' interpretation of the Reindeer Act. It limited *Mancari*'s application to "statutes that affect uniquely Indian interests." Such an interpretation of *Mancari* contrasts sharply with the District of Columbia Circuit's

expansive view as to what types of special treatment are shielded by *Mancari.* Given the grave constitutional concerns raised when federal agencies, without express authorization from Congress, create racial classifications for the sole purpose of providing "naked preference for Indians" unrelated to their "unique Indian interests," this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, and those in the Petition for Writ of Certiorari, Petitioner respectfully requests the petition be granted and a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

DATED: March, 2003.

Respectfully submitted,

SHARON L. BROWNE
Counsel of Record
ANTHONY T. CASO
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner